

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920

No. 46

INTERNATIONAL BRIDGE COMPANY, PLAINTIFF IN
ERROR,

vs.
THE PEOPLE OF THE STATE OF NEW YORK.

ON WRIT TO THE SUPREME COURT OF THE STATE OF NEW YORK

THOMAS J. M. M.

(1920)

(26,646)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918.

No. 560.

INTERNATIONAL BRIDGE COMPANY, PLAINTIFF IN
ERROR,

vs.

THE PEOPLE OF THE STATE OF NEW YORK.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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Court of Appeals.

STATE OF NEW YORK, ss:

Pleas in the Court of Appeals, Held at Court of Appeals Hall, in the City of Albany, on the 12th day of March, in the Year of Our Lord One Thousand Nine Hundred and Eighteen, Before the Judges of said Court.

Witness, The Hon. Frank H. Hiscock, Chief Judge, presiding.

R. M. BARBER, *Clerk*.

Remittitur March 13, 1918.

THE PEOPLE, &c., Respondent,

agst.

THE INTERNATIONAL BRIDGE Co., Appellant.

Be it remembered, That on the 31st day of October, in the year of our Lord one Thousand nine hundred and Seventeen The International Bridge Co., the appellant in this action, came here into the Court of Appeals, by Moot, Sprague, Brownell & Marcy, its attorneys, and filed in the said Court a Notice of Appeal and return thereto from the Judgment of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And The People, &c., the respondent in said action, afterward appeared in said Court of Appeals by Merton E. Lewis, Attorney-General.

Which said Notice of Appeal and the return thereto filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Adelbert Moot of counsel for the Appellant, and by Mr. James S. Y. Ivins of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from in this action, be in all things affirmed. And it was further ordered and adjudged that the respondent recover against the appellant costs of appeal to this Court.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be in all things affirmed with costs as aforesaid, and stand in full force, strength and effect.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals, remitted into the Supreme Court of the State of New York, before the Justices

thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court before the Justices thereof, &c.

R. M. BARBER,
*Clerk of the Court of Appeals
of the State of New York.*

Court of Appeals, Clerk's Office.

Albany, Mar. 13, 1918.

I hereby certify that the *preceding* record contains a correct transcript of the proceedings in said action in the Court of Appeals, with the papers originally filed therein, attached thereto.

[Seal Court of Appeals, State of New York.]

R. M. BARBER, *Clerk.*

e

Volume 1.

Original.

STATE OF NEW YORK:

Court of Appeals.

PEOPLE OF THE STATE OF NEW YORK, Plaintiff-Respondent,

vs.

INTERNATIONAL BRIDGE Co., Defendant-Appellant.

Record on Appeal.

Merton E. Lewis, Attorney-General, Attorney for Plaintiff-Respondent, Capitol, Albany, N. Y.

Moot, Sprague, Brownell & Marcy, Attorneys for Defendant-Appellant, 302 Erie Co. Bank Bldg., Buffalo, N. Y.

Filed Oct. 31, 1917.

Albany County, N. Y., Clerk's office. Filed Mar. 23, 1918.

STATE OF NEW YORK.

Court of Appeals

PEOPLE OF THE STATE OF
NEW YORK,

Plaintiff-Respondent,

vs.

INTERNATIONAL BRIDGE
COMPANY,

Defendant-Appellant.

2

STATEMENT UNDER RULE 41.

3

This action was commenced by the service of a summons and complaint on January 13, 1916.

Defendant's answer was duly served on January 19, 1916.

The names of the original parties to this action are the People of the State of New York, plaintiff, and International Bridge Company, defendant. 4

Hon. Merton E. Lewis, Attorney General for the State of New York, has succeeded Hon. Egburt E. Woodbury, former Attorney General, as attorney for the plaintiff.

Notice of Appeal.

- 5 Moot, Sprague, Brownell & Marey, are attorneys for the defendant.

There have been no changes in the parties to this action or their attorneys, other than that shown above.

6

NOTICE OF APPEAL.

SUPREME COURT—ALBANY COUNTY.

PEOPLE OF THE STATE OF
NEW YORK,

Plaintiff,

vs.

INTERNATIONAL BRIDGE
COMPANY,

Defendant.

7

8

PLEASE TAKE NOTICE that the defendant, International Bridge Company, hereby appeals to the Appellate Division of the Supreme Court, Third Department, from the judgment of the Supreme Court, entered herein in Albany County Clerk's office on the 20th day of November, 1916, in favor of the plaintiff and against the defendant, for the sum of \$525.66 and \$218.76 costs, and

Summons.

defendant appeals from each and every part of 9
said judgment.

Dated, November 27, 1916.

MOOT, SPRAGUE, BROWNELL & MARCY,
Attorneys for Defendant,
Office and Post Office Address,
302 Erie County Bank Bldg., 20
Buffalo, N. Y.

To
Hon. Egbert E. Woodbury,
Attorney-General.
Clerk of the County of Albany.

SUMMONS.

11

SUPREME COURT—COUNTY OF ALBANY.

PEOPLE OF THE STATE OF
NEW YORK.

Plaintiffs,

vs.

INTERNATIONAL BRIDGE
COMPANY,

Defendant.

12

To the above named defendant:

YOU ARE HEREBY SUMMONED to answer
the complaint in this action, and to serve a copy
of your answer on the plaintiff's attorney within
twenty days after the service of this summons, ex-

Complaint.

- 13 clusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Trial to be held in the County of Albany.

Dated, January 11, 1916.

14

E. E. WOODBURY,
Attorney-General, Plaintiffs' Attorney,
Office and Post Office Address,
Capitol, Albany, N. Y.

COMPLAINT.

15

SUPREME COURT—ALBANY COUNTY.

PEOPLE OF THE STATE OF
NEW YORK,

Plaintiffs,

vs.

16

INTERNATIONAL BRIDGE
COMPANY,

Defendant.

The complaint of the People of the State of New York, by Egbert E. Woodbury, their Attorney-General, alleges upon information and belief the following facts constituting their cause of action:

Complaint.

That the defendant is a domestic corporation, 17
organized under and pursuant to the provisions of
Chapter 753 of the Laws of 1857, under the corpo-
rate name of International Bridge Company, and
that in and by such act the said defendant was au-
thorized and empowered to construct, maintain
and manage a bridge across the Niagara river
from the City of Buffalo to some point near Fort
Erie in Canada, so as not materially to impede the
navigation of said river, said bridge to be con- 18
structed with two draws, one across Black Rock
Harbor and the other across the main channel of
the river; and in and by Sections 15 and 16 of said
act the said company was given authority to con-
struct such bridge for the passage of persons on
foot and in carriages and otherwise, as for pas-
sage of railroad trains and provided for the erec-
tion of toll gates and the rates of tolls that could 19
be charged for the passage over such bridge of
pedestrians, animals and horse-drawn vehicles,
whenever the said bridge should be completed for
the passage of ordinary teams and carriages.

That in the same year, 1857, a similar corpora-
tion was created under the laws of the Dominion
of Canada for the construction, maintenance, 20
working and managing of a bridge across the Ni-
agara river from some point at or near the Village
of Waterloo, (known as Fort Erie), in the town-
ship of Bertie, to the City of Buffalo, and further
provided that the bridge should be constructed,
“as well for the passage of persons on foot and
in carriages and otherwise as for the passage of
railway trains and such railway companies as are

Complaint.

- 21 hereinafter mentioned or referred to shall have and be entitled to the same and equal rights and privileges in the passage of the said bridge and in the use of the machinery and fixtures thereof and of all the approaches thereto."

- 22 Both charters made provisions empowering railroads to loan their credit to the bridge companies or to subscribe to the stock thereof, and municipal corporations beneficially affected by the bridge were also permitted to subscribe to the stock under the Canadian Act.

- 23 Chapter 753 of the Laws of 1857 was amended by Chapter 135 of the Laws of 1858, and by Chapter 294 of the Laws of 1858 and by the latter act the City of Buffalo was authorized and empowered to guarantee the payment of interest on moneys expended in the construction of the bridge and to raise the funds necessary for the payment thereof, but the bridge was not completed for several years thereafter and no money was raised by the city for such purpose.

- 24 Chapter 753, Laws of 1857, was further amended by Chapter 54, Laws of 1862, Chapter 225, Laws of 1867, Chapter 550, Laws of 1869, Chapter 390, Laws of 1871, and Chapter 332, Laws of 1898.

Chapter 550 of the Laws of 1869, provided for consolidation of the said International Bridge Company with any other bridge company or corporation theretofore, or which might be thereaf-

Complaint.

ter incorporated under the laws of the Dominion 25
 of Canada for a similar purpose and to enter into
 all required contracts and agreements therewith,
 and after making full provision for the union and
 consolidation of said bridge companies for the pur-
 pose of creating and maintaining a bridge across
 the Niagara river at or near the Village of Fort
 Erie in the County of Welland, to the City of Buf-
 falo, Section 6 of said act provided as follows: 26

“Section 6. Upon the making and perfect- 26
 ing of said agreement and act of consolida-
 tion as provided in the preceding section, and
 filing said agreement as in said section pro-
 vided, the several corporations, parties there-
 to, shall be deemed and taken to be consolidat-
 ed, and to form one corporation by the name
 in said agreement provided, possessing all 27
 the rights, privileges and franchises, and sub-
 ject to all disabilities and duties of each of
 such corporations so consolidated, except as
 herein provided.”

That pursuant to the aforesaid act and a similar
 act passed by the Canadian Parliament, the con-
 solidation was perfected shortly thereafter and
 the bridge was soon thereafter fully constructed 28
 and has been maintained solely as a railroad
 bridge, and no passageway for people on foot or
 for animals or vehicles has ever been constructed
 or placed upon said bridge.

That by Chapter 666 of the Laws of 1915, a new
 section was added to Chapter 753 of the Laws of
 1857, numbered 15-a, which provided that a road-

Complaint.

29 way for vehicles and a pathway for pedestrians
should be constructed upon the draw across Black
Rock Harbor, upon the bridge owned by this de-
fendant giving a passageway over said draw be-
tween Squaw Island and the mainland of New
York State, such roadway and footpath to be com-
pleted and ready for use by January 1, 1916, and
in case of the failure of the above named Interna-
30 tional Bridge Company or its successor in interest
so to complete the same on or before said last men-
tioned date, the said company should be liable to
a penalty of fifty-dollars per day for each day that
it should remain in default, and provided that such
penalties should be sued for and collected by the
Attorney-General in any court of competent juris-
diction. The Act further provided for the erec-
tion of toll gates and rates of tolls which could be
31 charged for the use of such roadway and pathway,
which act became a law and took effect on the
22nd day of May, 1915.

The plaintiffs hereby refer to said several acts
hereinbefore stated and make the same a part of
this complaint.

32 The plaintiffs further show that the said defend-
ant, the International Bridge Company, has whol-
ly failed and neglected to construct or place upon
said bridge across Black Rock Harbor, a roadway
for vehicles or a pathway for pedestrians as re-
quired by said Chapter 666 of the Laws of 1915,
and made default in the construction of such road-
way and pathway as required by said Act on each
of the days of January 1st to January 10, 1916,

Complaint.

inclusive, a period of ten days, and the said de- 33
 fendant, contrary to and in violation of the pro-
 visions of said Chapter 666 of the Laws of 1915,
 during the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th
 and 10th days of January, 1916, inclusive, failed,
 refused and neglected to construct such roadway
 or pathway upon said bridge, and thereby the said
 defendant incurred and became liable for a penal-
 ty of fifty dollars for each and every day above 34
 specified, amounting in all to the sum of five hun-
 dred dollars.

That by reason of the aforesaid facts the plain-
 tiff is entitled to recover of and from the said de-
 fendant the aforesaid sum of five hundred dollars
 in penalties, on account of the said defendant's
 default in constructing the roadway and pathway
 aforesaid. 35

WHEREFORE, the plaintiffs demand judg-
 ment against the said defendant for the sum of
 five hundred dollars (\$500) with interest thereon
 from January 10, 1916, together with the costs of
 this action.

E. E. WOODBURY,

Attorney-General, Attorney for Plaintiffs,

Office and Post Office Address, 36
 Capitol, Albany, N. Y.

State of New York,)
 County of Albany. { ss.:

EGBURT E. WOODBURY, being duly sworn,
 deposes and says that he is the Attorney-General

Answer.

37 of the State of New York, and Attorney for the plaintiffs herem, and is one of the plaintiffs; that he has read the foregoing complaint and knows the contents thereof and that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

E. E. WOODBURY.

38

Subscribed and sworn to before me,
this 12th day of January, 1916.
W. M. Thomas,
Notary Public.

39

ANSWER.

SUPREME COURT—ALBANY COUNTY.

40

PEOPLE OF THE STATE OF
NEW YORK,

Plaintiff,

against

INTERNATIONAL BRIDGE
COMPANY,

Defendant.

Now comes the defendant, International Bridge Company, by Moot, Sprague, Brownell & Marey, its attorneys, and for its answer to the complaint herein alleges:

Answer.

FIRST: Admit and alleges the incorporation 41
of this defendant under and by virtue of Chapter
753 of the Laws of 1857, and of a similar corpora-
tion under the laws of Canada, to wit: Chapter
227 of 20th Victoria, as alleged in said complaint,
and that each of said corporations possessed, by
virtue of the act of its incorporation, the powers
set forth in said complaint; and defendant admits
that said corporations were consolidated, pur- 42
suant to an act of the Legislature of the State of
New York, being Chapter 550 of the Laws of
1869, and an act of the Canadian Parliament,
being Chapter 65 of the 32nd and 33rd Victoria,
as alleged in said complaint.

SECOND: Defendant further alleges that
after the passage of said Act of Legislature of 43
the State of New York and of the Parliament of
Canada, authorizing the consolidation of said cor-
porations, and prior to the commencement of the
construction of said bridge, an act was duly pass-
ed by the Congress of the United States on June
30, 1870, entitled Chapter 176 of the Acts of 1870,
which provided that any bridge and its appur-
tenances which should be constructed across the 44
Niagara River from the City of Buffalo, New
York, to Canada, in pursuance of the provisions
of said Act of the New York Legislature incor-
porating said International Bridge Company, or
of any acts of said Legislature then in force
amending the same, should be lawful structures,
and said Act of Congress authorized the same to
be constructed and maintained as provided by

Answer.

- 45 said Act of the New York Legislature and such
amendments thereto, anything in any law or laws
of the United States to the contrary notwithstanding,
and said Act of Congress further declared
such bridge to be an established post route for the
mails of the United States, and provided that the
location of such bridge should be subject to the
approval of the Secretary of War, but not to be
46 located south of Squaw Island, and further pro-
vided that such bridge should have at least two
draws or not less than 160 feet in width in clear
between the piers, which should be located at the
points best calculated to accommodate the com-
merce of said river, and that the piers of said
bridge should be parallel to the current of said
river and that said bridge should be subject in its
construction to the supervision of the Secretary
47 of War of the United States, to whom the plans
and specifications relative to its construction
should be submitted for approval, and that all
railway companies desiring to use said bridge
should have and be entitled to equal rights and
privileges in the passage of the same, and in the
use of the machinery and fixtures thereof and of
all the approaches thereto, upon such terms and
48 conditions as should be prescribed by the District
Court of the United States for the Northern Dis-
trict of New York, upon hearing the allegations
and proofs of the parties, in case they should not
agree, and said Act of Congress further provided
that the right to alter or amend said Act, so as
to prevent or remove all material obstructions to
the navigation of said river by the construction
of said bridge was thereby expressly reserved.

Answer.

THIRD: That thereafter and in or about the 49
years 1870 to 1874 said bridge was constructed
by the defendant with two draws, one across
Black Rock Harbor and the other across the main
channel of the River, as provided by said Act of
the Legislature of the State of New York incor-
porating said Bridge Company, and authorized
by said Act of Congress, but said bridge was con-
structed as a railroad bridge, exclusively, with- 50
out any provision for footpaths or roadways
thereon.

FOURTH: That after the completion of said
bridge an act was passed by the Congress of the
United States, approved on the 23rd day of June,
1874, entitled Chapter 475 of the Acts of 1874,
approving the modification in the plans of said
bridge, and declaring said bridge as constructed 51
to be a lawful structure, and an established post
route for the mail of the United States.

FIFTH: That in or about the year 1881, an
information was filed by the Attorney General of
the Province of Ontario, seeking to restrain the
use of said bridge by railways until the same
should be put into condition for ordinary traffic, 52
or in the alternative, for the removal of said
bridge as a nuisance, or to compel permission of
its use by foot passengers on payment of the
statutory tolls: that said proceeding was prose-
cuted to the Court of Appeal for said Province
of Ontario, and it was held and determined by
said Court of Appeal that said provision in the

Answer.

- 53 special act incorporating said corporation under the laws of Canada, to wit; Caption 227 of 20th Victoria, providing "that the said bridge shall be as well for the passage of persons on foot and otherwise as for the passage of railway trains," was permissive, and not mandatory, and imposed upon said corporation no obligation to construct footpaths or roadways across its bridge, for the
- 54 accommodation of person on foot, or in carriages, or otherwise, and that specific performance of said provision would not be enforced.

- SIXTH: That thereafter and in or about the years 1899 to 1901, said bridge was re-built by the defendant and in connection therewith, plans for the re-building of said bridge were submitted to and approved by the Secretary of War of the
- 55 United States, on or about the 29th day of March, 1899, as required by the Acts of Congress in such case made and provided; That the written approval of said plans by said Secretary of War contained the following provision:

- 56 "That if the Secretary of War shall hereafter deem it necessary or advisable that the portion of the bridge over Black Rock Harbor shall be remodeled or changed in any manner, such change shall be made by the owners of the bridge, or their assigns, at their own expense."

SEVENTH: That said plans so approved by the said Secretary of War showed wings to be constructed on either side of said proposed new bridge, for the accommodation of roadways and footpaths, but that in the building of said bridge,

Answer.

said defendant omitted the construction of said wings and made no provision for roadways and footpaths upon said new bridge, because defendant was advised by its engineers that said wings would impose an excessive and dangerous strain upon the piers of said bridge; That said bridge was re-built under the supervision of the resident representative at Buffalo of the Secretary of War and said modification in said plans approved by the Secretary of War was duly reported by said representative to said Secretary of War and said Secretary of War acquiesced in and assented to said modification.

EIGHTH: That the Congress of the United States, in and by the Rivers and Harbors Act, approved June 13, 1902, provided that the Secretary of War and Chief of Engineers of the Army should make an investigation of Black Rock Harbor, with a view of obtaining a suitable channel for deep water craft around the rocks and shoals at the head of Niagara River and in compliance with said Act, the Secretary of War on or about January 13, 1904, transmitted to the House of Representatives certain reports of a preliminary examination and survey of said Black Rock Harbor. That thereafter, the Congress of the United States, by the Rivers and Harbors Act approved March 3, 1905, made an appropriation for the improvement of Black Rock Harbor, in accordance with said report, and plans and specifications were thereupon prepared to carry out said improvement, and Congress

Answer.

- 61 thereafter, in the Rivers and Harbors Acts of subsequent years, made further appropriations for the carrying out of said improvements; That it was a part of the project for the improvement of said Black Rock Harbor, that the United States should acquire all of the right and title of the State of New York, if any, to the lands and waterways necessary to said improvement, including that portion of the Erie Canal adjacent to Black Rock Harbor, and the lands under the waters of Black Rock Harbor, and the United States required a conveyance thereof from the State of New York as a condition of making said improvement.
- 62

- NINTH: That thereafter, by Chapter 373 of the Laws of 1904, the Legislature of the State of New York authorized the Land Board to convey to the United States such lands then owned by the State under the waters of the Niagara River, or in the vicinity of said River in the City of Buffalo, including such lands as were then used for canal purposes in said City, and as might be deemed abandoned by the Canal Board, as might be required by the United States in the construction of said Ship Canal. That thereafter, and on or about the 28th day of June, 1905, the Canal Board of the State of New York duly passed a resolution abandoning the portion of the Erie Canal adjacent to Black Rock Harbor and all of the lands under water of Black Rock Harbor, at and adjacent to the place where the same is crossed by the bridge of this defendant, upon con-
- 63
- 64

Answer.

dition that the United States should do the work 65
referred to and provided for in said Act of Con-
gress, and a like resolution was duly passed by
the Commissioners of the Land Office of the State
of New York; and thereafter, and on or about the
25th day of July, 1905, pursuant to said resolu-
tions and in accordance with said Chapter 373 of
the Laws of 1904, the State of New York duly
conveyed to the United States, by a deed dated 66
on that day and recorded in Erie County Clerk's
office on the 11th day of January, 1906, in Liber
1018 of Deeds at page 315, all the right, title and
interest of the State of New York in and to said
lands and waterways, including the portion of
the Erie Canal and towpath adjacent to the Black
Rock Harbor and the lands under the water of
the Black Rock Harbor, and said lands and waters 67
have ever since been under the exclusive juris-
diction and control of the United States, which
has exercised undisputed authority over them, in
connection with the improvement of Black Rock
Harbor, which was commenced shortly thereafter
by the United States and has since been com-
pleted.

TENTH: That thereafter and in or about the 68
year 1907, the Secretary of War served a notice,
dated April 2, 1907, upon said defendant, stat-
ing that said Secretary of War had good reason
to believe that said bridge over Black Rock Har-
bor and Erie Canal, being a part of the Interna-
tional Bridge, was an unreasonable obstruction to
the free navigation of Black Rock Harbor and

Answer.

69 channel as projected, and requiring the defendant to remove the existing pivot pier and side span and to construct a bridge in accordance with requirements of the Secretary of War specified in said notice.

70 ELEVENTH: That pursuant to the requirements of said notice the defendant submitted plans to the Secretary of War for the re-building of that portion of its bridge over Black Rock Harbor; that said plans showed wings on each side of said proposed bridge for the purpose of accommodating roadways and footpaths, but said wings were shown in dotted lines and were stated upon said plans to be "for future roadway" and there was a notation upon said plans as follows:
71 "Roadways shown in dotted lines not to be put in at present, but provision is made in the design of the bridge for their future construction;" that said plans, containing said notation, were duly approved by the Secretary of War of the United States and said bridge was thereafter built by the defendant over said Black Rock Harbor, but the said wings were not constructed by the defendant and no provision was made upon
72 said bridge for roadways and footpaths.

TWELFTH: That said bridge was constructed under the supervision of the resident representative of the Secretary of War and after the completion thereof, said representative duly reported to the Secretary of War the completion of said bridge, in accordance with the approved plans for its construction.

Answer.

THIRTEENTH: Defendant admits that the Legislature of the State of New York, by the passage of an alleged act designated as Chapter 666 of the Laws of 1915, attempted to amend Chapter 753 of the Laws of 1857, being the special act in incorporating this defendant, by adding a new section thereto, numbered 15-a, containing the provisions alleged in the complaint, and further admits that defendant has failed and neglected to construct or place upon said bridge, across Black Rock Harbor, a roadway for vehicles or a pathway for pedestrians, as required by said alleged act of the Legislature, and admits that defendant failed, refused and neglected to construct such roadway or pathway during the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, and 10th days of January, 1916, but denies that thereby the defendant incurred and became liable for a penalty of fifty dollars (\$50.00) for each and every of such days or for any penalty whatever.

FOURTEENTH: For a further and separate defense to the alleged cause of action set forth in said complaint, defendant repeats and alleges all of the matters hereinbefore admitted and alleged and further alleges that said so-called Act of the Legislature of the State of New York, to wit: Chapter 666 of the Laws of 1915, was and is null and void, and of no force and effect, because the same impairs the obligation of contracts, to wit: the franchises granted to this defendant by the Legislature of the State of New York and by the Parliament of Canada in the acts of its incorporation, and attempts to impose upon defendant burdens not imposed as condi-

Answer.

- 77 tions of said franchises when the same were granted, to wit: the obligation to maintain a footpath and roadway across the Black Rock Harbor draw of its bridge, and to maintain a bridge and give a passageway from the City of Buffalo to Squaw Island, in contravention of Article 1, Section 10, Subdivision 1 of the Constitution of the United States; and said act deprives defendant of its
- 78 property, without due process of law, in contravention of the first section of the 14th amendment to the Constitution of the United States, and of Article 1, Section 6 of the Constitution of the State of New York.

- FIFTEENTH: For a second further and separate defense to the alleged cause of action set forth in said complaint, defendant repeats
- 79 and alleges all of the matters hereinbefore admitted and alleged, and further alleges that said so-called Act of Legislature of the State of New York, to wit: Chapter 666 of the Laws of 1915, was and is null and void and of no force and effect, because the tolls fixed thereby for the use of said roadway and pathway are so low and inadequate that the same will not yield defendant
- 80 a fair return upon the investment required by said act to be made in the construction and maintenance of said roadway, and pathway, and will be confiscatory, and said act purports to provide that no charge shall be made by this defendant for the use thereof for empty wagons or automobile trucks used for commercial purposes, or for the drivers thereof, thereby depriving this defendant of its property without due process of

Answer.

law, in contravention of the first section of the 81
14th amendment of the Constitution of the United
States, and of Article One, Section 6 of the Con-
stitution of the State of New York.

SIXTEENTH: For a third further and sep-
arate defense to the alleged cause of action set
forth in said complaint, defendant repeats and al-
leges all of the matters hereinbefore admitted or
alleged, and further alleges that the Niagara riv- 82
er is a navigable water of the United States,
forming the international boundary between the
United States and the Dominion of Canada, a de-
pendency of the British Empire, and that Black
Rock Harbor is the name of that part of said
Niagara river which passes between the main-
land of the United States and Squaw Island in
the said river, that all of the commerce passing 83
over the said bridge of the defendant across said
Niagara river is either interstate commerce or
foreign commerce between the United States and
foreign nations, and that defendant's said bridge
is an instrumentality of such interstate and for-
eign commerce, that by the special acts herein-
before specified affecting the said bridge of the
defendant and also by the general acts relating 84
to the construction of bridges over navigable
waters of the United States and requiring that
the plans for such bridges be approved by the
Secretary of War and by said Rivers and Harbors
Acts hereinbefore alleged, providing for the im-
provement of Black Rock Harbor, and by the
duly authorized acts of the Secretary of War ap-
proving the plans for the construction and re-
construction of defendant's said bridge and re-

Answer.

- 85 quiring the re-construction of the draw of such
bridge across Black Rock Harbor, and approving
plans for the same as hereinabove alleged, and
by requiring the cession and conveyance by the
State of New York of all of its right, title and in-
terest in and to the lands under the waters of
Black Rock Harbor and of that portion of the
Erie Canal adjacent thereto, the Congress of the
86 United States has assumed and exercised exclu-
sive jurisdiction over the bridge of the defend-
ant, including said draw over Black Rock Har-
bor, and has assumed and exercised exclusive ju-
risdiction over said Black Rock Harbor, including
that portion thereof which was formerly a part
of the Erie Canal, under and by virtue of Article
1, Section 8, Subdivision 3 of the Constitution of
the United States, providing that Congress shall
87 have power to regulate commerce with foreign
nations and among the several states, and that
the said attempted act of the Legislature of the
State of New York, to wit: Chapter 666 of the
Laws of 1915, is null and void, and of no force
and effect, because it is in contravention of said
Article 1, Section 8, Subdivision 3 of the Consti-
tution of the United States, and of the Acts of
88 Congress heretofore mentioned, passed under
and by virtue of the power so conferred upon
Congress by the Constitution of the United
States, and said so-called Act of the Legislature
of the State of New York is an attempted inter-
ference with and regulation of foreign and in-
terstate commerce, and is an attempt to interfere
with, regulate and impose additional burdens
upon the bridge of defendant over waters of the

Answer.

United States forming an international boundary, over which Congress has assumed and exercises exclusive jurisdiction, in contravention of said provision of the Constitution of the United States. 89

WHEREFORE, defendant demands that the complaint herein be dismissed, with costs to this defendant.

MOOT, SPRAGUE, BROWNELL & MARCY, 90
Attorneys for Defendant,
 Office and Postoffice Address,
 302 Erie County Bank Building,
 Buffalo, New York.

State of New York,)
 County of Erie. (ss.:

HENRY WARE SPRAGUE, being duly sworn, deposes and says that he is a director of the defendant, International Bridge Company, in the above entitled action; that he has read the foregoing answer and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true. 91 92

(Signed) HENRY W. SPRAGUE.

Subscribed and sworn to before
 me this 19th day of January, 1916.

(Signed)

Frances Scheffer,

Notary Public,

in and for Erie County, New York.

26

REQUESTS TO FIND.

93 SUPREME COURT—ALBANY COUNTY.

PEOPLE OF THE STATE OF
NEW YORK,

Plaintiff,

against

INTERNATIONAL BRIDGE
COMPANY,

94

Defendant.

The defendant submits the annexed proposed findings of fact which it deems established by the evidence herein, and proposed conclusions of law, which it desires and requests be made.

Dated, Buffalo, N. Y., July 7, 1916.

95

MOOT, SPRAGUE, BROWNELL & MARCY,

Attorneys for Defendant,

Office and Postoffice Address,

302 Erie County Bank Building,

Buffalo, N. Y.

96

FINDINGS OF FACT.

I.

Found, W. P. R.

That the defendant is a consolidated corporation, formed by the consolidation of a corporation organized under and by virtue of a special Act of the Legislature of the State of New York.

Requests to Find.

to wit: Chapter 753 of the Laws of 1857, and 97
 Acts amendatory thereof and supplementary
 thereto, for the purpose of constructing a bridge
 across the Niagara River from the City of Buf-
 falo, New York, to some point near Fort Erie in
 Canada, and a corporation of the same name or-
 ganized for similar purposes under and by vir-
 tue of a special act of the Legislative Council and
 Assembly of Canada, to wit: Chapter 227 of 20th 98
 Victoria. That said New York corporation and
 said Canadian corporation were duly consolidated
 in or about the year 1870, pursuant to authority
 granted by the Legislature of the State of New
 York, by Chapter 550 of the Laws of 1869, passed
 on the 4th day of May, 1869, and pursuant to au-
 thority granted by the Parliament of Canada by
 an act passed on or about the 22nd day of June,
 1869, to wit: Chapter 65 of 32nd and 33rd Victo- 99
 ria: That said consolidated corporation has
 its principal office within the United States in the
 City of Buffalo, New York.

II.

Found. W. P. R.

That in and by said Act of the Legislature of
 the State of New York (Chapter 550, Laws of
 1869) authorizing the consolidation of said New
 York corporation and said Canadian corporation,
 it was provided, among other things as follows: 100

“Section 6. Upon the making and perfect-
 ing of said agreement and act of consolida-
 tion as provided in the preceding section
 and filing said agreement as in said section
 provided, the several corporations, parties
 thereto, shall be deemed and taken to be con-

Requests to Find.

- 101 solidated, and to form corporation by the name in said agreement provided, possessing all the rights, privileges and franchises, and subject to all the disabilities and duties of each of such corporations so consolidated, except as herein provided; but nothing in this act contained shall be construed as in any manner impairing any liability against the corporation in the title of this act mentioned, but such liability shall continue against the consolidated corporation contemplated by this act."
- 102

III.

Found, W. P. R.

- 103 That in and by Chapter 753 of the Laws of 1857, incorporating said New York corporation, it was provided that said bridge should be constructed with two draws one across Black Rock Harbor and the other across the main channel of the river, and it was further provided, among other things, as follows:

"Section 15. Said bridge may be constructed as well for the passage of persons on foot and in carriages and otherwise, as for the passage of railroad trains."

- 104 That the sixteenth section of said act provided for the erection of toll gates upon the completion of said bridge for the passage of ordinary teams and carriages, and authorized the directors to fix rates of toll not greater than the amounts specified in said section,

Requests to Find.

IV.

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Found, W. P. R.

That in and by Chapter 227 of 20th Victoria, incorporating said Canadian corporation, it was provided, among other things, as follows:

“XIV. The said bridge shall be as well for the passage of persons on foot and in carriages and otherwise, as for the passage of railway trains.”

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V.

Found, W. P. R.

That the Congress of the United States, by an act approved June 30, 1870, entitled Chapter 176 of the Acts of 1870, provided that any bridge and its appurtenances which should be constructed across the Niagara River from the City of Buffalo, New York, to Canada, in pursuance of the provisions of said Act of the New York Legislature incorporating said International Bridge Company, or of any acts of said Legislature then in force amending the same, should be lawful structures, and said Act of Congress authorized the same to be constructed and maintained as provided by said Act of the New York Legislature and such amendments thereto, anything in any law or laws of the United States to the contrary notwithstanding, and said Act of Congress further declared said bridge to be an established post route for the mails of the United States, and provided that the location of said bridge should be subject to the approval of the Secretary of War, but not to be located south of Squaw Island, and

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Requests to Find,

- 109 further provided that such bridge should have at least two draws of not less than 160 feet in width in clear between the piers, which should be located at the points best calculated to accommodate the commerce of said river, and that the piers of said bridge should be parallel to the current of said river and that said bridge should be subject in its construction to the supervision of the Secretary of War of the United States, to whom the plans and specifications relative to its construction should be submitted for approval, and that all railway companies desiring to use said bridge should have and be entitled to equal rights and privileges in the passage of the same and in the use of the machinery and fixtures thereof and of all the approaches thereto, upon such terms and conditions as should be prescribed by the District Court of the United States for the Northern District of New York, upon hearing the allegations and proofs of the parties in case they should not agree, and said Act of Congress further provided that the right to alter or amend said Act, so as to prevent or remove all material obstructions to the navigation of said river by the construction of said bridge was thereby expressly reserved.
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- 111
- 112

VI.

Found, W. P. R.

That thereafter and in or about the years 1870 to 1847, said bridge was constructed by the defendant with two draws, one across Black Rock

Requests to Find.

Harbor and the other across the main channel of the river, as provided by said Act of the Legislature of the State of New York incorporating said bridge company, and said bridge was built across Squaw Island on a trestle which afterwards was filled so as to present the appearance of a solid embankment, but said bridge was constructed as a railroad bridge, exclusively, without any provision for footpaths or roadways thereon.

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VII.

Found, W. P. R.

That after the completion of said bridge an act was passed by the Congress of the United States and approved on the 23rd day of June, 1874, entitled Chapter 475 of the Acts of 1874, approving the modification in the plans of said bridge, and declaring said bridge, as constructed, to be a lawful structure, and an established post route for the mail of the United States.

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VIII.

Refused, W. P. R.

That in or about the year 1881, an information was filed by the Attorney-General of the Province of Ontario, seeking to restrain the use of said bridge by railways until the same should be put into condition for ordinary traffic, or in the alternative, for the removal of said bridge as a nuisance, or to compel permission of its use by foot passengers on payment of the statutory tolls; that said proceeding was prosecuted to the

116

Requests to Find.

- 117 Court of Appeals for said Province of Ontario, and it was held and determined by said Court of Appeal that said provision in the special act incorporating said corporation under the laws of Canada, to wit: Caption 227 of 20th Victoria, providing "that the said bridge shall be as well for
 118 "the passage of persons on foot and otherwise as
 "for the passage of railway trains" was permissive, and not mandatory, and imposed upon said corporation no obligation to construct footpaths or roadways across its bridge, for the accommodation of persons on foot, or in carriages, or otherwise, and that specific performance of said provision would not be enforced.

IX.

- 119 Found, W. P. R.

That thereafter and in or about the years 1899-1901, said bridge was rebuilt by the defendant, and in connection therewith plans for the rebuilding of said bridge were submitted to and approved by the Secretary of War of the United States, on or about the 29th day of March, 1899, as required by Act of Congress in such case made
 120 and provided: That the written approval of said plans by said Secretary of War contained the following provision:

"That if the Secretary of War shall hereafter deem it necessary or advisable that the portion of the bridge over Black Rock Harbor shall be remodeled or changed in any manner, such change shall be made by the owners of the bridge, or their assigns, at their own expense."

Requests to Find.

X.

121

Found, W. P. R.

That said plans, so approved by said Secretary of War, showed wings to be constructed on either side of said proposed new bridge, for the accommodation of roadways and footpaths, but that in the building of said new bridge said defendant deviated from said plans so approved by the Secretary of War, in that it omitted entirely the construction of said wings, and made no provision for roadways or footpaths upon said new bridge; That said bridge was rebuilt under the supervision of the resident representative at Buffalo of the Secretary of War, and said modification in said plans approved by the Secretary of War was duly reported by said representative to said Secretary of War and said Secretary of War acquiesced in and assented to said modification.

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123

XI.

Found, W. P. R.

That the Congress of the United States, in and by the Rivers and Harbors Act, approved June 13, 1902, provided that the Secretary of War and Chief of Engineers of the Army should make an investigation of Black Rock Harbor, with a view of obtaining a suitable channel for deep water craft around the rocks and shoals at the head of Niagara River and in compliance with said Act, the secretary of war on or about January 13, 1904, transmitted to the House of Representa-

124

Requests to Find.

- 125 tives certain reports of a preliminary examination and survey of said Black Rock Harbor; That thereafter, the Congress of the United States, by the Rivers and Harbors Act approved March 3, 1905, made an appropriation for the improvement of Black Rock Harbor, in accordance with said report, and plans and specifications were thereupon prepared to carry out said improvement; and Congress thereafter, in the Rivers and
- 126 Harbors Acts of subsequent years, made further appropriations for the carrying out of said improvement; that it was a part of the project for the improvement of said Black Rock Harbor, that the United States should acquire all of the right and title of the State of New York, if any, to the lands and waterways necessary to said improvement, including that portion of the Erie Canal
- 127 adjacent to Black Rock Harbor, and the lands under the waters of Black Rock Harbor, and the United States required a conveyance thereof from the State of New York as a condition of making said improvement.

XII.

Found, W. P. R.

- 128 That thereafter, by Chapter 373 of the laws of 1904, the Legislature of the State of New York authorized the Land Board to convey to the United States such lands then owned by the state under the waters of the Niagara River, or in the vicinity of said river in the City of Buffalo, including such lands as were then used for canal

Requests to Find.

purposes in said city, and as might be deemed 129
 abandoned by the Canal Board, as might be re-
 quired by the United States in the construction of
 said Ship Canal. That thereafter, and on the
 28th day of June, 1905, the Canal Board of the
 State of New York duly passed a resolution
 abandoning the portion of the Erie Canal adja-
 cent to Black Rock Harbor and all of the lands
 under water of Black Rock Harbor, at and adja- 130
 cent to the place where the same is crossed by
 the bridge of this defendant, upon condition that
 the United States should do the work referred to
 and provided for in said Act of Congress, and a
 like resolution was duly passed by the Commis-
 sioners of the Land Office of the State of New
 York; and thereafter, and on or about the 25th
 day of July, 1905, pursuant to said resolutions
 and in accordance with said Chapter 373 of the 131
 Laws of 1904, the State of New York duly con-
 veyed to the United States, by a deed dated on
 that day and recorded in Erie County Clerk's
 office on the 11th day of January, 1906, in Liber
 1018 of Deeds at page 315, all the right, title and
 interest of the State of New York in and to said
 lands and waterways, including the portion of the
 Erie Canal and tow-path adjacent to the Black
 Rock Harbor and the lands under the water of the 132
 Black Rock Harbor, and said lands and waters
 have ever since been under the exclusive jurisdic-
 tion and control of the United States, which has
 exercised undisputed authority over them, in con-
 nection with the improvement of Black Rock Har-
 bor, which was commenced shortly thereafter by

Requests to Find.

- 133 the United States and has since been completed. That said lands include the lands crossed by the Black Rock Harbor span of defendant's bridge.

XIII.

Found, W. P. R.

- 134 That thereafter and in or about the year 1907, the Secretary of War served a notice, dated April 2, 1907, upon said defendant, stating that said Secretary of War had good reason to believe that said bridge over Black Rock Harbor and Erie Canal, being a part of the International Bridge, was an unreasonable obstruction to the free navigation of Black Rock Harbor and channel as projected, and requiring the defendant to remove the existing pivot pier and side span and
135 to construct a bridge, in accordance with the requirements of the Secretary of War specified in said notice.

XIV.

Found, W. P. R.

- 136 That pursuant to the requirements of said notice, the defendant submitted plans to the Secretary of War for the rebuilding of that portion of its bridge over Black Rock Harbor; that said plans showed wings on each side of said proposed bridge for the purpose of accommodating roadways and footpaths but said wings were shown in dotted lines and were stated upon said plans to be "for future roadway" and there was a nota-

Requests to Find.

tion upon said plans as follows: "Roadways 137
shown in dotted lines not to be put in at present, but provision is made in the design of the bridge for their future construction;" That said plans, containing said notation, were duly approved by the Secretary of War of the United States and said bridge was thereafter built by the defendant over said Black Rock Harbor, but the said wings were not constructed by the defendant and no provision was made upon said bridge 138
for roadways and footpaths.

XV.

Found, W. P. R.

That said bridge was constructed under the supervision of the resident representative of the Secretary of War and after the completion thereof, and on or about the 6th day of December, 1915, said representative duly reported to the Secretary of War the completion of said bridge, in accordance with the approved plans for its construction. 139

XVI.

Found, W. P. R. 140

That thereafter the Legislature of the State of New York, by Chapter 666 of the Laws of 1915, amended Chapter 753 of the Laws of 1857, incorporating said International Bridge Company, by adding thereto a new section after Section 15, to be known as Section 15 A, and to read as follows:

Requests to Find.

- 141 "15-a. A roadway for vehicles and a pathway for pedestrians shall be constructed upon the draw across Black Rock Harbor giving a passageway over said draw between Squaw Island and the mainland of New York State, such roadway and footpath to be completed and ready for use by January first, nineteen hundred and sixteen, and in case of the failure of said corporation or its successor in interest so to complete the same on or before said date, said corporation, or its successor in interest, shall be liable to a penalty of fifty dollars per day for each day that it shall be in default. Such penalty may be sued for and collected by the attorney-general in any court of competent jurisdiction.
- 142 Upon the completion of said roadway and pathway, said company may erect toll gates and fix rates of toll for the use thereof, but no greater tolls than the following shall be charged for the use of the said roadway or pathway; for every foot passenger three cents for each passenger one way or five cents for round trip for every horse and rider, five cents; for every carriage; except as hereinafter expressly provided, with horse or horses and occupants, ten cents; for every automobile, except as hereinafter expressly provided, and occupants, ten cents; for loaded wagons and loaded automobile trucks for commercial purposes, two cents for each ton of material carried, and no charge for empty wagons or automobile trucks used for commercial purposes, or for the drivers thereof."
- 143
- 144

XVII.

Found, W. P. R.

That the defendant has failed and neglected to construct or place upon the Black Rock Harbor

Requests to Find.

draw of its said bridge, a roadway for vehicles 145
 or a pathway for pedestrians, as required by said
 Chapter 666 of the Laws of 1915, and has taken
 no steps toward the construction of such road-
 way and pathway and has not complied with the
 regulations of said Chapter 666 of the Laws of
 1915, in any particular.

XVIII.

146

Found, W. P. R.

That all of the commerce passing over the
 bridge of the defendant across the Niagara River,
 between the City of Buffalo, New York, and the
 Dominion of Canada, is either interstate com-
 merce or foreign commerce between the United
 States and foreign nations, and said bridge is an
 instrumentality of such interstate and foreign 147
 commerce.

XIX.

Found, W. P. R.

That the Niagara River is a navigable water
 of the United States forming the international
 boundary between the United States and the Do-
 minion of Canada, a dependency of the British 148
 Empire.

XX.

Found, W. P. R.

That Black Rock Harbor is the name of that
 part of said Niagara River which passes between

Requests to Find.

- 149 the mainland of the United States and Squaw Island in said river and said Black Rock Harbor is wholly within the territorial boundaries of the United States and of the State of New York.

XXI.

Found, W. P. R.

- 150 That Squaw Island, exclusive of the right of way of the defendant across the island and a strip 75 feet wide along the Black Rock Harbor shore owned by the United States of America, consists of about 100 acres of upland and 24 acres of land under water, all of which was owned by the Squaw Island Development Corporation, a domestic corporation, up to the time of the trial of this action.

151

XXII.

Refused, W. P. R.

- 152 That Squaw Island is a vacant, undeveloped strip of land, except for certain boat houses and small shacks along the shore occupied during the summer season by tenants of said Squaw Island Development Company who pay a nominal rental therefor. That about a half dozen of said families and a few squatters on government lands remain upon the Island the year around. That said Island is also used for occasional ball games and picnics.

XXIII.

Found, W. P. R.

That the only commercial business or development upon said Island consists of the removal of

Requests to Find.

sand, gravel and grit therefrom by the Squaw Island Sand & Gravel Corporation, a domestic corporation organized by the same persons interested in the Squaw Island Development Corporation. That said Squaw Island Sand & Gravel Corporation in the year from June, 1915, to June, 1916, removed from said island, by boats, 100,000 tons of gravel. 153

XXIV.

154

Refused, W. P. R.

That in the present state of development of Squaw Island, the traffic available for the roadway and footway which defendant is required to construct by the terms of said statute, would not bring in a revenue to exceed \$2500.00 per annum, at the rates prescribed in said statute. 155

XXV.

Found, W. P. R.

That plans were made for the development of Squaw Island in 1894 and the persons interested in the Squaw Island Development Corporation and the Squaw Island Sand & Gravel Corporation have organized several other corporations for the future development of Squaw Island, including the Squaw Island Freight Terminal Co., Inc., and caused plans to be prepared in February, 1913, for the projected development of Squaw Island as a land and water freight terminal, but no steps have been taken as yet to carry any of such plans into effect. 156

Requests to Find.

157

XXVI.

Refused, W. P. R.

That the cost of construction of a wing addition to the Black Rock Harbor span of the defendant's bridge, adequate to sustain a suitable roadway 16 feet wide and a footway with proper approaches thereto, including the cost of the land necessary for such approaches, would have been approximately \$44,000.00 on the 31st day of December, 1915, and on the first day of June, 1915, the cost would have been approximately \$200.00 less than on December 31st of said year.

XXVII.

Refused, W. P. R.

That the annual charge for maintenance and operation of such wing addition, and approaches, including interest on cost of land and improvement, taxes, maintenance and depreciation of steel work, flooring and approaches, painting and wages of toll collectors would be more than \$8,000.00 per annum.

160

CONCLUSIONS OF LAW.

I.

Refused, W. P. R.

Chapter 666 of the Laws of 1915, requiring the said defendant to construct a footpath and roadway across the Black Rock Harbor of its said bridge and fixing tolls for the use of said foot-

Requests to Find.

path and roadway, was and is null and void, and 161
 of no force and effect, because the same impairs
 the obligation of contracts, to wit: the franchises
 granted to the defendant by the Legislature of
 the State of New York and by the Parliament of
 Canada in and by the acts of its incorporation,
 and attempts to impose upon said defendant
 burdens not imposed as conditions of said fran-
 chises when the same were granted, to wit: the 162
 obligation to maintain a footpath and roadway
 across the Black Rock Harbor draw of its bridge,
 and to maintain a bridge and give a passageway
 from the City of Buffalo to Squaw Island in the
 State of New York, in contravention of Article
 1, Section 10, Subdivision 1 of the Constitution
 of the United States and said act deprives de-
 fendant of its property without due process of 163
 law, in contravention of the first section of the
 14th amendment to the Constitution of the United
 States and of Article 1, Section 6 of the Constitu-
 tion of the State of New York.

11.

Refused, W. P. R.

That Chapter 666 of the Laws of 1915, was and 164
 is null and void and of no force and effect, be-
 cause it deprives the defendant of its property
 without due process of law, in contravention of
 the first section of the 14th amendment to the
 Constitution of the United States and of Article
 1, Section 6 of the Constitution of the State of
 New York, in that said Act purports to provide
 that no charge shall be made by the said defend-

Requests to Find.

- 165 ant for the use of said footpath and roadway
across the Black Rock Harbor draw of said
bridge, required by said act to be constructed for
empty wagons or automobile trucks used for com-
mercial purposes, or for the drivers thereof, and
that the tolls fixed for the use of said roadway
and pathway are so low and inadequate, in view
of the amount of traffic available, that the same
166 will not yield to defendant a fair return upon the
investment required for the construction and
maintenance of roadway and pathway, and will
be confiscatory in their operation and effect.

III.

Refused, W. P. R.

- 167 That by a general act, approved March 3, 1899
(Chapter 425, Section 9) relating to the construc-
tion of bridges over navigable waters of the
United States, and requiring that the plans for
such bridges be approved by the Secretary of
War of the United States, and by said acts of
June 30, 1870 (Chapter 186), and June 23, 1874
(Chapter 475) hereinabove found, relating spe-
cifically to the said bridge of the defendant, and
by said Rivers and Harbors Acts of June 13, 1902,
168 and March 3, 1905, providing for the improvement
of Black Rock Harbor, and subsequent acts mak-
ing further appropriations for said purpose, and
by the duly authorized acts of the Secretary of
War, approving plans for the construction and re-
construction of said bridge and requiring the re-
construction of the draw of said bridge across
the Black Rock Harbor, and approving plans for

Requests to Find.

the same as hereinabove found, and accepting
 said bridge as completed, in accordance with said
 plans, and by requiring the cession and convey- 169
 ance by the State of New York of all of its right,
 title and interest in and to the lands under the
 waters of Black Rock Harbor, and of that por-
 tion of the Erie Canal adjacent thereto, the Con-
 gress of the United States has assumed and ex-
 exercised exclusive jurisdiction over the bridge of
 the defendant, including said draw over the Black 170
 Rock Harbor, and has assumed and exercised ex-
 clusive jurisdiction over said Black Rock Har-
 bor, including that portion thereof which was
 formerly a part of the Erie Canal.

IV.

Refused, W. P. R.

171

That Chapter 666 of the Laws of 1915 of the
 State of New York is null and void and of no
 force and effect, because it is in contravention of
 Article 1, Section 8, Subdivision 3 of the Consti-
 tution of the United States, providing that the
 Congress shall have power to regulate commerce
 with foreign nations and among the several
 states, and of the acts of Congress hereinabove
 found, passed under and by virtue of the power 172
 so conferred upon congress by the constitution of
 the United States, and said so-called Act of the
 Legislature of the State of New York, is an at-
 tempted interference with and regulation of such
 foreign and interstate commerce, and is an at-
 tempt to impose additional burdens upon a

Exceptions.

- 173 bridge over navigable waters of the United States forming an international boundary, over which congress has assumed and exercised exclusive jurisdiction, in contravention of said provision of the Constitution of the United States.

Refused, W. P. R.

- 174 That the defendant is entitled to judgment dismissing the complaint of the plaintiff herein, with costs to be taxed.

V.

Refused, W. P. R.

Let judgment be entered accordingly.

Dated, July , 1916.

.....
Justice Supreme Court.

175

— — — — —
EXCEPTIONS.

SUPREME COURT—ALBANY COUNTY.

176

PEOPLE OF THE STATE
OF NEW YORK,

Plaintiffs,

vs.

INTERNATIONAL BRIDGE
COMPANY,

Defendant.

The defendant hereby excepts to the Findings of Fact and the Conclusions of Law herein, and

Exceptions.

to the court's refusal to find as requested by said 177
defendant, as follows:

I.

Except to so much of the VIII Finding of
Fact as finds that it was held and determined by
said Court of Appeals that the Attorney General
of said Province of Ontario was not the proper
party plaintiff to maintain such an action, and 178
that the court did not have jurisdiction to grant
the relief demanded, on the ground that there is
no evidence tending to sustain the same.

II.

To the XXII Finding of Fact and to each and
every part thereof, on the ground that there is no 179
evidence tending to sustain the same.

III.

To the XXIII Finding of Fact and to each and
every part thereof, on the ground that there is
no evidence tending to sustain the same.

IV.

180

To the XXIV Finding of Fact and to each and
every part thereof, on the ground that there is no
evidence tending to sustain the same.

V.

To the Conclusion of Law numbered I.

48

Exceptions.

181

VI.

To the Conclusion of Law numbered II.

VII.

To the Conclusion of Law numbered III.

182

VIII.

To the Conclusion of Law numbered IV.

IX.

To the Conclusion of Law numbered V.

183

X.

To the Conclusion of Law numbered VI.

XI.

To the Conclusion of Law numbered VII.

XII.

184

To the Conclusion of Law numbered VIII.

XIII.

To the Conclusion of Law numbered IX.

XIV.

Defendant hereby excepts to the court's refusal to find as requested in defendant's proposed Finding of Fact VIII.

Exceptions.

XV.

185

Defendant hereby excepts to the court's refusal to find as requested in defendant's proposed Finding of Fact XXII.

XVI.

Defendant hereby excepts to the court's refusal to find as requested in defendant's proposed Finding of Fact XXIV. 186

XVII.

Defendant hereby excepts to the court's refusal to find as requested in defendant's proposed Finding of Fact XXVI.

XVIII.

187

Defendant hereby excepts to the court's refusal to find as requested in defendant's proposed Finding of Fact XXVII.

XIX.

Defendant hereby excepts to the court's refusal to make the Conclusion of Law numbered I, requested by the defendant. 188

XX.

Defendant hereby excepts to the court's refusal to make the Conclusion of Law numbered II, requested by the defendant.

Exceptions.

189

XXI.

Defendant hereby excepts to the court's refusal to make the Conclusion of Law numbered III, requested by the defendant.

XXII.

190

Defendant hereby excepts to the court's refusal to make the Conclusion of Law numbered IV, requested by the defendant.

XXIII.

191

Defendant hereby excepts to the court's refusal to make the Conclusion of Law numbered V, requested by the defendant.

Dated, November 22, 1916.

MOOT, SPRAGUE, BROWNELL & MARCY,
Attorneys for Defendant,
Office & Postoffice Address,
302 Erie County Bank Bldg.,
Buffalo, N. Y.

192 To

Clerk of the County of Albany.

Egburt E. Woodbury,
Attorney-General,
Attorney for the Plaintiff.

DECISION.

SUPREME COURT—ALBANY COUNTY. 193

PEOPLE OF THE STATE OR
NEW YORK,*Plaintiffs,*

vs.

INTERNATIONAL BRIDGE
CO.,*Defendants.*

194

This action having regularly come on for trial and having been heard before Hon. William P. Rudd, justice of this court, without a jury, at a Trial Term of this court held on the 20th day of June, 1916, upon the pleadings and proceedings herein, the plaintiffs having appeared by Egburt E. Woodbury, their attorney-general, and the defendant having appeared by Moot, Sprague, Brownell & Marey, its attorneys, and the proofs of both parties having been adduced and their respective counsel heard, and due deliberation having been had thereon, I do decide and find as follows:

195

FINDINGS OF FACT.

196

I.

That the defendant is a consolidated corporation, formed by the consolidation of a corporation organized under and by virtue of a special act of

Decision.

- 197 the Legislature of the State of New York, to wit: Chapter 753 of the Laws of 1857, and acts amendatory thereof and supplementary thereto, for the purpose of constructing a bridge across the Niagara river from the City of Buffalo, New York, to some point near Fort Erie in Canada, and a corporation of the same name organized for similar purposes under and by virtue of a
- 198 special act of the Legislative Council and Assembly of Canada, to wit: Chapter 227 of 20th Victoria. That said New York corporation and said Canadian corporation were duly consolidated in or about the year 1870, pursuant to authority granted by the Legislature of the State of New York, by Chapter 550 of the Laws of 1869, passed on the 4th day of May, 1869, and pursuant to authority granted by the Parliament of Canada by an act passed on or about the 22nd day of
- 199 June, 1869, to-wit: Chapter 65 of 32nd and 33d Victoria; that said consolidated corporation has its principal office within the United States in the City of Buffalo, New York.

II.

- 200 That in and by said Act of the Legislature of the State of New York (Chapter 550, Laws of 1869) authorizing the consolidation of said New York corporation and said Canadian corporation, it was provided, among other things, as follows:
- “Section 6. Upon the making and perfecting of said agreement and act of consolidation as provided in the preceding section,

Decision.

and filing said agreement as in said section 201
provided, the several corporations, parties
thereto, shall be deemed and taken to be con-
solidated, and to form one corporation by
the name in said agreement provided, pos-
sessing all the rights, privileges and fran-
chises, and subject to all the disabilities and
duties of each of such corporations so con-
solidated, except as herein provided; but 202
nothing in this act contained shall be con-
strued as in any manner impairing any li-
ability against the corporation in the title of
this act mentioned, but such liability shall
continue against the consolidated corpora-
tion contemplated by this act."

III.

203

That in and by Chapter 753 of the Laws of 1857,
incorporating said New York corporation, it was
provided that said bridge should be constructed
with two draws, one across Black Rock Harbor
and the other across the main channel of the
river, and it was further provided, among other
things, as follows:

"Section 15. Said bridge may be • con- 204
structed as well for the passage of persons
on foot and in carriages and otherwise, as
for the passage of railroad trains."

That the sixteenth section of said act provided
for the erection of toll gates upon the completion
of said bridge for the passage of ordinary teams
and carriages and authorized the directors to fix

Decision.

205 rates of toll not greater than the amounts specified in said section.

IV.

That in and by Chapter 227 of 20th Victoria, incorporating said Canadian corporation, it was provided, among other things, as follows:

206 "XIV. The said bridge shall be as well for the passage of persons on foot and in carriages and otherwise, as for the passage of railway trains."

V.

207 That the Congress of the United States, by an act approved June 30, 1870, entitled Chapter 176 of the Acts of 1870, provided that any bridge and its appurtenances which should be constructed across the Niagara river from the City of Buffalo, New York, to Canada, in pursuance of the provisions of said Act of the New York Legislature incorporating said International Bridge Company, or of any acts of said Legislature then in force amending the same, should be lawful
208 structures, and said Act of Congress authorized the same to be constructed and maintained as provided by said Act of the New York Legislature and such amendments thereto, anything in any law or laws of the United States to the contrary notwithstanding, and said Act of Congress further declared said bridge to be an established post route for the mails of the United States, and

Decision.

provided that the location of said bridge should 209
be subject to the approval of the Secretary of
War, but not to be located south of Squaw Island,
and further provided that such bridge should
have at least two draws of not less than 160 feet
in width in clear between the piers, which should
be located at the points best calculated to accom-
modate the commerce of said river, and that the
piers of said bridge should be parallel to the cur- 210
rent of said river and that said bridge should be
subject in its construction to the supervision of
the Secretary of War of the United States, to
whom the plans and specifications relative to its
construction should be submitted for approval,
and that all railway companies desiring to use
said bridge should have and be entitled to equal
rights and privileges in the passage of the same 211
and in the use of the machinery and fixtures
thereof and of all the approaches thereto, upon
such terms and conditions as should be prescrib-
ed by the District Court of the United States for
the Northern District of New York, upon hearing
the allegations and proofs of the parties in case
they should not agree, and said Act of Congress
further provided that the right to alter or amend 212
said Act, so as to prevent or remove all material
obstructions to the navigation of said river by
the construction of said bridge was thereby ex-
pressly reserved.

VI.

That thereafter and in or about the years 1870
to 1874, said bridge was constructed by the de-

Decision.

- 213 fendant with two draws, one across Black Rock Harbor and the other across the main channel of the river, as provided by said Act of the Legislature of the State of New York incorporating said Bridge Company, but said bridge was constructed as a railroad bridge, exclusively, without any provision for footpaths or roadways thereon.

VII.

214

- That after the completion of said bridge an act was passed by the Congress of the United States and approved on the 23d day of June, 1874, entitled Chapter 475 of the Acts of 1874, approving the modifications in the plans of said bridge, and declaring said bridge, as constructed, to be a lawful structure, and an established post route for
- 215 the mail of the United States.

VIII.

- That in or about the year 1881, an information was filed by the Attorney General of the Province of Ontario, seeking to restrain the use of said bridge by railways until the same should be put
- 216 into condition for ordinary traffic, or in the alternative, for the removal of said bridge as a nuisance, or to compel permission for its use by foot passengers on payment of the statutory tolls. That said proceeding was prosecuted to the Court of Appeal for the said Province of Ontario, and it was held and determined by said Court of Appeal, that the Attorney General of said Province

Decision.

of Ontario was not the proper party plaintiff to 217
maintain such an action, and that said bridge
did not constitute a nuisance, and that the court
did not have jurisdiction to grant the relief de-
manded.

IX.

That thereafter and in or about the years 1899- 218
1901, said bridge was rebuilt by the defendant,
and in connection therewith plans for the re-
building of said bridge were submitted to and
approved by the Secretary of War of the United
States, on or about the 29th day of March, 1899
as required by Act of Congress in such case made
and provided; that the written approval of said
plans by said Secretary of War contained the fol-
lowing provisions: 219

“That if the Secretary of War shall here-
after deem it necessary or advisable that the
portion of the bridge over Black Rock Har-
bor shall be remodeled or changed in any
manner, such change shall be made by the
owners of the bridge, or their assigns, at
their own expense.”

220

X.

That said plans, so approved, by said Secre-
tary of War showed wings to be constructed on
either side of said proposed new bridge, for the
accommodation of roadways and footpaths, but
that in the building of said new bridge, said de-

Decision.

- 221 fendant deviated from said plans so approved by
the Secretary of War, in that it omitted entirely
the construction of said wings, and made no pro-
vision for roadways or footpaths upon said new
bridge; that said bridge was rebuilt under the
supervision of the resident representative at
Buffalo of the Secretary of War and said modi-
fication in said plans approved by the Secretary
222 of War was duly reported by said representative
to said Secretary of War and said Secretary of
War acquiesced in and assented to said modifica-
tion.

XI.

- That the Congress of the United States, in and
by the Rivers & Harbors Act, approved June 13
223 1902, provided that the Secretary of War and
Chief of Engineers of the Army should make an
investigation of Black Rock Harbor, with a view
of obtaining a suitable channel for deep water
craft around the rocks and shoals at the head of
Niagara river and in compliance with said Act,
the Secretary of War, on or about January 13,
1904, transmitted to the House of Representa-
224 tives certain reports of a preliminary examina-
tion and survey of said Black Rock Harbor; that
thereafter, the Congress of the United States,
by the Rivers and Harbors Act, approved March
3, 1905, made an appropriation for the improve-
ment of Black Rock Harbor, in accordance with
said report, and plans and specifications were
thereupon prepared to carry out said improve-

Decision.

ment; and Congress thereafter, in the Rivers and Harbors Acts of subsequent years, made further appropriations for the carrying out of said improvement; that it was a part of the project for the improvement of said Black Rock Harbor, that the United States should acquire all of the right and title of the State of New York if any, to the lands and waterways necessary to said improvement, including that portion of the Erie canal adjacent to Black Rock Harbor, and the lands under the waters of Black Rock Harbor, and the United States required a conveyance thereof from the State of New York as a condition of making said improvement. 225 226

XII.

That thereafter, by Chapter 373 of the Laws of 1904, the Legislature of the State of New York authorized the Land Board to convey to the United States such lands now owned by the state under the waters of the Niagara river, or in the vicinity of said river in the City of Buffalo, including such lands as were then used for canal purposes in said city, and as might be deemed abandoned by the Canal Board, as might be required by the United States in the construction of said Ship Canal. That thereafter, and on the 28th day of June, 1905, the Canal Board of the State of New York duly passed a resolution abandoning the portion of the Erie canal adjacent to Black Rock Harbor and all of the lands under water of Black Rock Harbor, and adjacent to 227 228

Decision.

- 229 the place where the same is crossed by the bridge
of this defendant, upon condition that the United
States should do the work referred to and pro-
vided for in said Act of Congress, and a like reso-
lution was duly passed by the Commissioners of
the land office of the State of New York; and
thereafter, and on or about the 15th day of July,
1905, pursuant to said resolutions and in accord-
230 ance with said Chapter 373 of the Laws of 1904,
the State of New York duly conveyed to
United States, by a deed dated on that day and
recorded in Erie County Clerk's office on the 11th
day of January, 1906, in Liber 1018 of Deeds at
page 315, all the right, title and interest of the
State of New York in and to said lands and
waterways, including the portion of the Erie can-
231 al and towpath adjacent to the Black Rock Har-
bor and the lands under the water of the Black
Rock Harbor, and said lands and waters have
ever since been under the exclusive jurisdiction
and control of the United States, which has ex-
ercised undisputed authority over them, in con-
nection with the improvement of Black Rock Har-
bor, which was commenced shortly thereafter by
the United States and has since been completed.

232

XIII.

That thereafter and in or about the year 1907
the Secretary of War served a notice, dated April
2, 1907, upon said defendant, stating that said
Secretary of War had good reason to believe that
said bridge over Black Rock Harbor and Erie

Decision.

canal, being a part of the International Bridge, 233
 was an unreasonable obstruction to the free navigation of Black Rock Harbor and channel as projected, and requiring the defendant to remove the existing pivot pier and side span and to construct a bridge, in accordance with the requirements of the Secretary of War specified in said notice.

XIV.

234

That pursuant to the requirements of said notice, the defendant submitted plans to the Secretary of War for the rebuilding of that portion of its bridge over Black Rock Harbor; that said plans showed wings on each side of said proposed bridge for the purpose of accommodating roadways and footpaths but said wings were shown in dotted lines and were stated upon said plans to be "for future roadway" and there was a notation upon said plans as follows: "Roadways shown in dotted lines not to be put in at present, but provision is made in the design of the bridge for their future construction:" That said plans, containing said notation, were duly approved by the Secretary of War of the United States and said bridge was thereafter built by the defendant 235
 over said Black Rock Harbor, but the said wings were not constructed by the defendant and no provision was made upon said bridge for roadways and footpaths. 236

XV.

That said bridge was constructed under the supervision of the resident representative of the

Decision.

- 237 Secretary of War and after the completion thereof, said representative duly reported to the Secretary of War the completion of said bridge, in accordance with the approved plans for its construction.

XVI.

- 238 That thereafter the Legislature of the State of New York, by Chapter 666 of the Laws of 1915, amended Chapter 753 of the Laws of 1857, incorporating said International Bridge Company, by adding thereto a new section after Section 15, to be known as Section 15-A, and to read as follows:

- 239 "15-A. A roadway for vehicles and a pathway for pedestrians shall be constructed upon the draw across Black Rock Harbor giving a passageway over said draw between Squaw Island and the mainland of New York State, such roadway and footpath to be completed and ready for use by January first, nineteen hundred and sixteen, and in case of the failure of said corporation or its successor in interest so to complete the same on or before said date, said corporation, or its
- 240 successor in interest, shall be liable to a penalty of fifty dollars per day for each day that it shall be in default. Such penalty may be sued for and collected by the Attorney-General in any court of competent jurisdiction.

Upon the completion of said roadway and pathway said company may erect toll gates

Decision.

and fix rates of toll for the use thereof, but 241
no greater tolls than the following shall be
charged for the use of the said roadway or
pathway; for every foot passenger three
cents for each passenger one way or five
cents for round trip; for every horse and
rider, five cents; for every carriage, except
as hereinafter expressly provided, with horse
or horses and occupants, ten cents; for every 242
automobile, except as hereinafter expressly
provided, and occupants, ten cents; for load-
ed wagons and loaded automobile trucks for
commercial purposes, two cents for each ton
of material carried, and no charge for empty
wagons or automobile trucks used for com-
mercial purposes, or for the drivers there-
of."

XVII.

243

That the defendant has failed and neglected to
construct or place upon the Black Rock Harbor
draw of its said bridge, a roadway for vehicles
or a pathway for pedestrians, as required by said
Chapter 666 of the Laws of 1915, and has taken
no steps toward the construction of such roadway
and pathway and has not complied with the regu- 244
lations of said Chapter 666 of the Laws of 1915,
in any particular.

XVIII.

That all of the commerce passing over the
bridge of the defendant across the Niagara river,

Decision.

- 245 between the City of Buffalo, New York, and the Dominion of Canada, is either interstate commerce or foreign commerce between the United States and foreign nations, and said bridge is an instrumentality of such interstate and foreign commerce.

XIX.

- 246 That the Niagara river is a navigable water of the United States forming the international boundary between the United States and the Dominion of Canada, a dependency of the British Empire.

XX.

- 247 That Black Rock Harbor is the name of that part of said Niagara river which passes between the mainland of the United States and Squaw Island in said river and said Black Rock Harbor is wholly within the territorial boundaries of the United States and of the State of New York.

XXI.

- 248 That Squaw Island in said river is wholly within the territorial boundaries of the United States and of the State of New York.

XXII.

The probable cost of constructing the roadway and footpath required by Chapter 666 of the Laws

Decision.

of 1915, is insignificant in comparison to the as- 249
sets and annual net earnings of the defendant.

XXIII.

There is no evidence in the record showing that
the investment required by Chapter 666 of the
Laws of 1915, would not yield a reasonable return
to the defendant.

250

XXIV.

The construction of the roadway and footpath
required by Chapter 666 of the Laws of 1915, was
and is necessary for the public interest and for
the public convenience.

CONCLUSIONS OF LAW.

251

I.

Chapter 666 of the Laws of 1915 does not con-
travene any of the provisions of Article I, Sec-
tion 10, Subdivision 1 of the Constitution of the
United States.

252

II.

Chapter 666 of the Laws of 1915 does not con-
travene any of the provisions of the Fourteenth
Amendment to the Constitution of the United
States.

Decision.

253

III.

Chapter 666 of the Laws of 1915 does not contravene any of the provisions of Article 1, Section 6 of the Constitution of the State of New York.

IV.

254

Chapter 666 of the Laws of 1915 does not contravene any provision of Article 1, Section 8 Subdivision VII of the Constitution of the United States or any act of Congress enacted thereunder.

V.

255

Chapter 666 of the Laws of 1915 does not contravene any provision of Article I, Section 8 Subdivision III of the Constitution of the United States or any act of Congress enacted thereunder.

VI.

256

Chapter 666 of the Laws of 1915 does not contravene any provision of any act of Congress regulating or affecting the navigable waters of the United States.

VII.

Chapter 666 of the Laws of 1915 is within the police power of the State of New York and is a proper, reasonable and valid exercise thereof.

Decision.

VIII.

257

Chapter 666 of the Laws of 1915 is not violative of any constitutional provision or paramount statute of the United States or of the State of New York.

IX.

258

Defendant is liable to a penalty of fifty dollars for each day after the first day of January, 1916, during which it failed to construct a roadway for vehicles and a pathway for pedestrians, upon the draw across Black Rock Harbor, giving a passageway over said draw between Squaw Island and the mainland of New York State, and having been so in default for ten days prior to the commencement of this action, the plaintiffs are entitled to judgment against the defendant herein for the sum of five hundred (\$500) dollars, with interest from January 10, 1916, and with costs to be taxed.

259

Let judgment be entered accordingly.

Dated, Albany, N. Y., October , 1916.

260

WM. P. RUDD,
Justice Supreme Court.

JUDGMENT.

261

SUPREME COURT—ALBANY COUNTY.

 PEOPLE OF THE STATE
 OF NEW YORK,
, *Plaintiffs,*

vs.

 INTERNATIONAL BRIDGE
 COMPANY,

262

Defendant.

263

264

The issues in this action having been regularly brought on for trial before Mr. Justice William P. Rudd at an adjourned Trial Term of this court, held on the 20th day of June, 1916, at the City Hall in the City and County of Albany and the plaintiffs appearing by Egbert E. Woodbury, Esq., their attorney-general, and the defendant appearing by Moot, Sprague, Brownell and Marcy, Esqs., its attorneys; and a jury having been waived by both parties; and the court having heard the allegations and proofs of the parties, and, after due deliberation having duly made its decision and filed the same on the 18th day of November, 1916, containing a statement of the facts found and the conclusions of law thereon, and directing judgment as hereinafter stated; and the plaintiffs' costs having been duly taxed at two hundred eighteen and 76/100 dollars (\$218.76), now, on motion of Egbert E. Woodbury, attorney-general, attorney for plaintiffs, it is,

ADJUDGED, that plaintiffs, the People of the State of New York, do recover of the defendant,

Case and Exceptions.

International Bridge Company, the sum of five hundred dollars (\$500) with interest thereon from January 10, 1916, amounting to twenty-five and 66/100 dollars (\$25.66), together with two hundred eighteen and 76/100 dollars (\$218.76) costs as taxed, making in all the sum of seven hundred forty-four and 42/100 dollars (\$744.42), and that said plaintiffs have execution therefor. 265

Dated, November 20, 1916. 266

WM. J. GRATTAN,
Clerk.

CASE AND EXCEPTIONS.

SUPREME COURT—ALBANY COUNTY. 267

THE PEOPLE OF THE
STATE OF NEW YORK.

vs.

INTERNATIONAL BRIDGE
COMPANY. 268

Appearances:

For the plaintiff, E. E. Woodbury, Attorney-General, by J. S. Y. Ivins, Deputy Attorney-General, Ralph A. Kellogg and Francis F. Baker.

For the City of Buffalo, Fred C. Rupp.

For defendant, Adelbert Moot and Mrs. Helen Z. M. Rodgers.

Case and Exceptions.

269 The issues in the above entitled action came on for trial at a Trial Term of the Supreme Court, held in the City Hall, in the City of Albany, N. Y., on Tuesday, June 20, 1916, before Hon. William P. Rudd, J., when the following proceedings were had:

Mrs. Rodgers opened the case on behalf of the defendant.

270 Mr. Ivins opened the case on behalf of the plaintiff.

It is stipulated that the embankment and trestle on Squaw Island were constructed at the same time as the iron and steel structure across Niagara river, running from Squaw Island westerly to the Dominion of Canada, and across the Black Rock Harbor, the easterly channel of the Niagara river.

271 Mrs. Rodgers: We offer in evidence Chapter 753 of the Laws of 1857, being the original act of the Legislature of the State of New York, incorporating the International Bridge Company.

Received and marked "Defendant's Exhibit 1."

272 Mrs. Rodgers: I offer in evidence Chapter 227, 20th Victoria, which is the Canadian Act incorporating the International Bridge Company, a certified copy of that act.

Received and marked "Defendant's Exhibit 2."

Mrs. Rodgers: I offer in evidence Chapter 550 of the Laws of 1869, being the act of the New York Legislature, authorizing the consolidation of the New York and Canadian corporations.

Case and Exceptions.

Received and marked "Defendant's Exhibit 3." 273

Mrs. Rodgers: I offer in evidence Chapter 65 of 32nd and 33rd Victoria, of the year 1869, being the Canadian Act authorizing the consolidation of the two companies.

Received and marked "Defendant's Exhibit 4." 274

Mrs. Rodgers: I offer in evidence act of Congress, approved June 30, 1870, Chapter 176, being the act authorizing the construction and maintenance of the International Bridge across the Niagara river.

Received and marked "Defendant's Exhibit 5." 275

(Mrs. Rodgers read portions of the same to the court).

Mrs. Rodgers: I offer in evidence act of Congress, dated June 23, 1874, Chapter 475, being the act declaring the bridge a lawful structure, after it was completed. 276

Received and marked "Defendant's Exhibit 6." 276

Mrs. Rodgers: I offer in evidence a certified copy of deed, dated May 18, 1871, between the Niagara River Hydraulic Company, and the International Bridge Company. This is the original deed of the right of way across Squaw Island.

Received and marked "Defendant's Exhibit 7." 276

(Mrs. Rodgers read portions of the same to the court).

Mrs. Rodgers: I offer in evidence deed dated

72

Case and Exceptions.

277 August 6, 1874, between the Niagara River Hydraulic Company and the International Bridge Company.

Received and marked "Defendant's Exhibit 8."

278 Mrs. Rodgers: I offer in evidence a copy of the report of the decision of the Attorney General vs. The International Bridge Company, reported in 6 Ontario Appeals Reports, 537.

Received and marked "Defendant's Exhibit 9."

Mrs. Rodgers: I offer in evidence plan for rebuilding the International Bridge, dated December 10, 1898, with the approval of the Secretary of War, dated March 29, 1899, attached.

Received and marked "Defendant's Exhibit 10."

279 Mrs. Rodgers: I offer in evidence a copy, certified by the Secretary of War, of a letter dated September 9, 1901, addressed to General G. L. Gillespie, Chief of Engineers, U. S. Army, Washington, D. C., from T. W. Symons, Major, Corps of Engineers.

280 Mr. Ivins: I object on the ground that these letters are irrelevant, incompetent and immaterial to the issue.

Objection overruled. Plaintiff excepted.

Received and marked "Defendant's Exhibit 11."

Mrs. Rodgers: I offer in evidence an excerpt from the Congressional Rivers and Harbors appropriation bill of June 13, 1902, Chapter 1079.

Received and marked "Defendant's Exhibit 12."

Case and Exception.

Mrs. Rodgers: I offer in evidence an excerpt 281
from Congressional Sundry appropriation bill for
1903, Chapter 1007.

Received and marked "Defendant's Exhibit
13."

Mrs. Rodgers: I offer in evidence copy of
document No. 428, 58th Congress, second session,
House of Representatives, being a communica-
tion to the House of Representatives from the
Secretary of War, dated January 13, 1904, trans- 282
mitting reports of Major Symons and Major
Bingham, regarding the Black Rock Harbor, and
also containing the opinion of Attorney General,
Gunnenn, dated February 15, 1903, in regard to
the abandonment and cession of lands under
Black Rock Harbor and the adjacent portion of
the Erie canal from the State of New York to the
United States. 283

Received and marked "Defendant's Exhibit
14."

Mrs. Rodgers: I offer in evidence an excerpt
from the proceedings of the Commissioners of
the Land Office, at a meeting held May 25, 1905,
reported at pages 124 and 125 of the proceedings
for 1905.

Received and marked "Defendant's Exhibit 284
15."

Mrs. Rodgers: I offer in evidence Chapter 373
of the Laws of 1904, being an act authorizing the
conveyance of land in the City of Buffalo to the
United States.

Received and marked "Defendant's Exhibit
16."

Case and Exceptions.

285 Mrs. Rogers: I offer in evidence an excerpt of the Congressional Rivers and Harbors appropriation bill of 1905, Chapter 1482.

Received and marked "Defendant's Exhibit 17."

286 Mrs. Rodgers: I offer in evidence an excerpt from the proceedings of the Commissioners of the Land Office; at a meeting held June 28, 1905, found on pages 152 to 158 of the proceedings of 1905.

Received and marked "Defendant's Exhibit 18."

Mrs. Rodgers: I offer in evidence deed dated July 25, 1905, from the People of the State of New York to the United States of America.

Received and marked "Defendant's Exhibit 19."

287 Mr. Moot: There will be no question about this deed of land including lands going under the easterly part of this bridge?

Mr. Ivins: Oh, no, we will admit that.

Mrs. Rodgers: I offer in evidence excerpt from Congressional Sundry appropriation bill of 1906, being Chapter 3914.

288 Received and marked "Defendant's Exhibit 20."

Mrs. Rodgers: I offer in evidence an excerpt from the Congressional Rivers and Harbors appropriation bill of 1907, being Chapter 2509.

Received and marked "Defendant's Exhibit 21."

Mrs. Rodgers: I offer in evidence an excerpt from Congressional Sundry appropriations bill of 1907, Chapter 2918.

Case and Exceptions.

Received and marked "Defendant's Exhibit 289
22."

Mrs. Rodgers: I offer in evidence a notice, dated July 18, 1907, from the Secretary of War to the International Bridge Company, and also a like notice to the Grand Trunk Railway Company, requiring the reconstruction of the Black Rock Harbor span of the International Bridge.

Received and marked "Defendant's Exhibits 290
23 and 24."

Mrs. Rodgers: I offer in evidence a certified copy of plans, dated August, 1909, for the reconstruction of Black Rock Harbor draw span, being the plans filed in the office of the Chief Engineer of the United States Army.

Received and marked "Defendant's Exhibit 291
25."

Mrs. Rodgers: I offer in evidence letter dated September 14, 1909, from the acting Secretary of War to Mr. Howard G. Kelly, Chief Engineer of the International Bridge Company and the Grand Trunk Company, approving the plans of August, 1909.

Received and marked "Defendant's Exhibit 292
26."

Mrs. Rodgers: I offer in evidence excerpt 292
from the Rivers and Harbors Act of 1909, Chapter 264.

Received and marked "Defendant's Exhibit 293
27."

Mrs. Rodgers: I offer in evidence excerpt from Congressional Rivers and Harbors appropriation bill of 1910, Chapter 382.

Case and Exceptions.

293 Received and marked "Defendant's Exhibit 28."

Mrs. Rodgers: I offer in evidence Chapter 666 of the Laws of 1915, being the act requiring the construction of this footpath and roadway.

Received and marked "Defendant's Exhibit 29."

294 Mrs. Rodgers: I offer in evidence certified copy of letter dated December 6, 1915, from L. V. Frazier, Major, Corps of Engineers, to the Chief of Engineers, United States Army, Washington, D. C. That is a letter stating the completion of the Black Rock span of the bridge according to the plans.

Received and marked "Defendant's Exhibit 30."

295 Mr. Ivins: All these letters from the Secretary of War go in under the same objection?

The Court: Yes.

Mrs. Rodgers: I offer in evidence a letter dated December 6, 1915, from Major L. V. Frazier to Mr. William L. Marcy; that letter simply states the method of acceptance of bridges by the Secretary of War and is offered for the purpose of avoiding the necessity of bringing Major Frazier here as a witness to testify.

296 Received and marked "Defendant's Exhibit 31."

H. H. Safford, for Deft., Direct.

H. ROBINSON SAFFORD, sworn for defendant, testified: 297

Examined by Mr. Moot:

Q. Mr. Safford, what is your profession? A. Civil Engineer.

Q. How long has that been your profession? A. 21 years continuously. 298

Q. Your experience in the profession has been gained how? A. It has been largely in connection with railroad construction, maintenance and operation.

Q. In what countries? A. In the United States and Canada.

Q. At the present time what is your position? A. My position is Chief Engineer of the International Bridge Company and the Grand Trunk Railway. 299

Q. How long have you been the Chief Engineer of the International Bridge Company and the Grand Trunk Railway Company? A. Since October, 1911.

Q. Have you had occasion to make an examination of the International Bridge and its surroundings in connection with your duties? A. Yes. 300

Q. So that you know them? A. Yes.

Q. (Presenting same) I show you a photograph marked 1, marked on the back as taken from the west end of the railroad embankment on Squaw Island looking southeast. Do you recognize that photograph? A. Yes.

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301 Q. As giving a correct view from the point indicated? A. Yes, it so appears to me.

Mr. Moot: I offer that in evidence.

Received and marked "Defendant's Exhibit 31-A."

302 Q. (Presenting same) I show you a photograph marked 2, taken from the same point as No. 1, looking west through the bridge to Canada; is that a correct photograph of what you see located at that point looking west through the bridge to Canada? A. It is.

Mr. Moot: I offer that in evidence.

Received and marked "Defendant's Exhibit 32."

303 Q. (Presenting same) I show you a photograph No. 3, taken from the same point as No. 1, looking north toward the north end of Squaw Island; is that a correct view from the point indicated?

304 Mr. Baker: I object to that on the ground that it doesn't appear what the date is, and it appears that there are squatters there and there are no squatters on the island. I make that objection for the Attorney-General, he not being familiar with the situation.

Mr. Moot: I am not offering the statements on the back of the photograph.

Mr. Baker: Then that is all right. Objection withdrawn.

Received and marked "Defendant's Exhibit 33."

A. Yes, it is.

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Q. (Presenting same) I now show you another 305
photograph taken on the west shore line of Squaw
Island, about 200 feet south of the railroad em-
bankment, looking northwest obliquely at the In-
ternational Bridge toward Canada; is that a cor-
rect view? A. It is.

Mr. Moot: I offer that in evidence.

Received and marked "Defendant's Ex-
hibit 34." 306

Q. (Presenting same) I now show you a view
No. 5, taken from the west shore line of Squaw
Island about 300 feet south of railroad embank-
ment, looking northeast across island; is that a
correct view? A. It is.

Mr. Moot: I offer that in evidence.

Received and marked "Defendant's Ex-
hibit 35." 307

Q. (Presenting same) I now show you No. 6,
taken from the west shore line of Squaw Island,
about halfway between the railroad embank-
ment and south end of island, looking northeast
across the island; is that a correct view? A. It
is.

Mr. Moot: I offer that in evidence.

Received and marked "Defendant's Ex-
hibit 36." 308

Q. (Presenting same) I now show you No. 7,
taken at the extreme south end of Squaw Island,
the shore line, looking north up the island to-
ward the railroad embankment; is that a correct
view? A. It is.

Mr. Moot: I offer that in evidence.

Received and marked "Defendant's Ex-
hibit 37."

H. K. Safford, for Deft., Direct.

309 Q. (Presenting same) I now show you No. 8, taken from the east shore line of Squaw Island, about halfway between railroad embankment and south end of island, looking northwest across island; is that a correct view? A. It is.

Mr. Moot: I offer that in evidence.

Received and marked "Defendant's Exhibit 38."

310 Q. (Presenting same) I now show you No. 9, taken at a point about two-thirds of the way north from the railroad embankment toward the north end of island and about the center of island, looking north at north end of island; is that a correct view? A. Yes, it is.

Mr. Moot: I offer that in evidence.

Received and marked "Defendant's Exhibit 39."

311 Mr. Baker: I object to this statement on the back of the photograph.

Mr. Moot: I am not offering the statements on the back of these photographs in any case. That is simply our method of identification. I don't claim that these statements on the back are evidence, or that Mr. Safford is testifying to them.

312 Q. (Presenting same) I now show you No. 10, taken from the same point as No. 9, looking southwest across island; is that a correct view? And when I say a correct view I mean not to date, but at some time after 1911 when you were there inspecting the property, I don't know when your last inspection was. A. It is.

Mr. Moot: I offer that in evidence.

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Received and marked "Defendant's Ex- 313
hibit 40."

Q. (Presenting same) I show you No. 11, taken from the same point as No. 9, looking southeast across island; is that a correct view from that point of view? A. It is.

Mr. Moot: I offer that in evidence.

Received and marked "Defendant's Ex-
hibit 41."

314

Q. (Presenting same) I now show you a photograph not numbered, and ask you to look at it and tell us what it shows and from what point of view it was evidently taken? A. This photograph is taken from the northwest corner of the draw span over the harbor looking to the southeast, and shows obliquely the span.

Q. Over the harbor? A. Over the harbor.

Q. (Mr. Baker) Of the present bridge? A. 315
Of the present bridge.

Mr. Moot: I offer that in evidence.

Received and marked "Defendant's Ex-
hibit 42."

Q. (Presenting same) I now show you another photograph not numbered, and ask you to look at that and tell us what that shows? A. That is a view of the present bridge over the 316
harbor, taken from a point near the northeast corner of the bridge and looking almost due west.

Q. And showing the bridge over what part?
A. Showing the bridge over the harbor.

Mr. Moot: I offer that in evidence.

Received and marked "Defendant's Ex-
hibit 43."

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317 Q. (Presenting same) I now show you another photograph not numbered and ask you to look at that and tell us what that shows? A. That is a photograph of the bridge over the harbor, taken from a point near the southwest corner of the span and looking northeasterly, and shows the bridge over the harbor.

Mr. Moot: I offer that in evidence.

318 Received and marked "Defendant's Exhibit 44."

Q. (Presenting same) I now show you still another unnumbered view and ask you to look at that and tell us what that shows? A. That is a view of the bridge over the harbor, taken from a point near the southeast corner of the span and looking almost due west, and is a picture of the bridge over the harbor.

319 Mr. Moot: I offer that in evidence.

Received and marked "Defendant's Exhibit 45."

Q. (Presenting same) I now show you still another unnumbered view and ask you to look at that and tell us what that is? A. That is a view of the span over the harbor, taken from a point very close to the center of the span and at the west end of it.

320 Q. Looking easterly? A. Looking through the bridge.

Q. Over the harbor? A. Looking through the bridge over the harbor.

Q. Easterly? A. Easterly.

Q. (The Court) The first view was a single track? A. That (indicating) is the river bridge; that (indicating) is the main span.

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Mr. Moot: I offer that in evidence. 321

Received and marked "Defendant's Exhibit 46."

Q. (The Court) Is there a double track on the embankment? A. Yes.

By Mr. Ivins:

Q. A switch seems to be near the bridge? A. Yes.

Q. And it is a double track from there all the way on? A. It is. 322

By Mr. Moot:

Q. (Presenting same) I now show you still another unnumbered view and ask you to look at that and tell us what that is? A. That is a view taken from the east end of the draw span over the harbor and near the center of the span, looking through the harbor bridge.

Q. Westerly? A. Westerly. 323

Mr. Moot: I offer that in evidence.

Received and marked "Defendant's Exhibit 47."

Q. (The Court) That is looking toward the mainland? A. That is looking toward the mainland.

Q. Mr. Safford, since this matter has come up and Chapter 666 of the Laws of this State for 1915 became a subject of discussion, at some time did you look the situation over there and make some study of it with a view to making an estimate of what it would cost to comply with the provisions of that chapter of the Laws of this State? A. I did. 324

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325 Q. About when did you make that study? A. I don't think I can recall the date that I made the first study, but it must have been about the time that this act was passed. I don't remember the date of the act. It was some months ago, however.

Q. Do you remember whether it was just before or just after the act was passed; can you tell that now? A. I can't recall that now.

326 Q. Do you know whether any copy of your figures or your estimate was furnished to the Attorney-General's office or not, or don't you know that? A. I don't know that; I am not able to say.

Q. Have you with you an estimate of what it would cost to comply with the provisions of that act? A. I have.

327 Q. I think you revised that some this morning, did you not? A. I did, yes.

Q. Won't you let me see that? (Witness produces same.)

Q. Those figures you have in your hand, that your assistant just handed to you, are the revised figures you made this morning? A. Yes, sir.

328 Q. You have two estimates there in your hand? A. Yes, sir.

Q. What is the difference between the two; I don't mean in dollars and cents, but I mean what is the basis of the difference between the two? A. One is an estimate for the highway arm to be constructed on the north side of the span over the harbor; the other is the cost of a similar highway on the south side.

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Q. The bridge you have made an estimate for 329
or the addition to the bridge which you have made
an estimate for in each case is to furnish accom-
modations according to the act for what? A.
For roadway traffic.

Q. So that both vehicles and foot passengers
can use the addition? A. Yes, sir.

Q. Is there a difference in the cost of putting
such an addition to the bridge over Black Rock 330
harbor, whether it is put on the north or the south
side? A. As far as the roadway on the span it-
self is concerned it makes no difference which side
it is put on.

Q. But it does make a difference which side it
is put on for some other reason? A. Yes.

Q. What other reason? A. One difference
is a wall is necessary to retain the slope of the 331
approach along the Niagara street entrance,
which is not required if it goes on the north side.
I will change that. One difference is if the road-
way is built on the south side a retaining wall is
necessary to retain the slope of the approach ad-
jacent to Niagara street.

Q. Niagara street, Buffalo? A. Buffalo. If
the roadway is built on the north side that wall is
not necessary. 332

Q. In dollars and cents what is the difference
between the amount it would cost to build such a
foot and vehicle bridge, whether you put it on the
north side or whether you put it on the south
side?

Mr. Ivins: Before they go into any
figures as to the price in dollars and cents
at all. I want to enter this objection, that

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333 whether or not this act is confiscatory depends entirely on relative values, and I insist before they go into any figures with regard to the cost of anything they have got to show what their balance sheets are and how well they can afford to make that expenditure.

334 After argument by respective counsel the objection was overruled, to which plaintiff excepted.

(Question repeated). A. The difference in cost of building the roadway and approaches is approximately \$1487. That is exclusive of lands up there.

Q. Exclusive of land? A. Yes.

335 Q. That is due to this retaining wall on the one side and the absence of it on the other, in the main? A. Yes.

Q. And when you take into account the land for the approaches to such an entrance to the bridge, then what is the difference?

Mr. Ivins: Mr. Safford hasn't yet been qualified as an expert in land value.

336 The Court: He is the Chief Engineer of the defendant. I assume that he must know the cost.

Mr. Ivins: I just wanted to get him qualified, because I am going to ask him some land value questions later on.

A. The approximate difference of the cost of the two pieces of land required for the approach is \$11,300.

Q. Which side being the more expensive of the

H. R. Safford, for Deft., Direct.

two? A. The north side is the more expensive 337
of the two.

Q. That difference is based on the actual cost
of the land? A. Yes, the actual cost.

Q. And actual purchase? A. Actual purchase.

Q. Do you know the land values and other
values involved in an estimate of the cost of building this addition to the bridge and its approaches? 338
A. Yes, sir.

Q. Your estimate shows that to build the addition on the north side of the bridge, including the land for the approaches, would cost how much? A. The total estimate, including the cost of the land on the north side is \$56,071.12.

Q. And on the south side? A. \$44,778.92.

Q. Now the maintenance of such an addition to the bridge, I suppose after it was built it 339
doesn't make any difference which side it is practically, except as to the interest, that is the only difference, is it not? A. That is practically the only difference, on account of the value of the land.

Q. Well, we will take it on the less costly of the two because then we only have to figure the interest to get the other difference. What is the maintenance cost annually? A. The interest 340
and taxes on the land, estimated at six per cent on the cost or six per cent on \$13,200 represents an annual burden of \$792. The interest on the physical improvement, estimated at five per cent, on \$32,576.12 is \$1628.86. The maintenance and depreciation on the steel work is estimated at five

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341 per cent. on the sum of \$12,770 and amounts to
\$638.50 per year. The estimated annual cost of
painting, \$45. The maintenance and depreciation
of the flooring is estimated at 20 per cent. on a
cost of \$4125, and represents \$825 per year. On
the approaches, the annual maintenance and de-
preciation, estimated at 10 per cent. on the sum
of \$15,656.12, represents \$1565.16 per year. That
342 covers the interest and maintenance.

Q. And on the operation? A. It is assumed
that it would be necessary to employ two men, one
days and one nights, to collect toll and protect
foot passengers. Assuming those men to be paid
\$60 per month, the annual cost for that item
would be \$2350 per year.

Q. Or on the least cost of the two possible ad-
ditions your maintenance annually is how much?
343 A. The annual fixed charge is estimated at \$8,-
374.

It is stipulated that in Squaw island, outside
of the bridge lands and the Government lands, ex-
cluding those but including the lands under water
between the harbor line and the island, there are
124 acres.

Q. You have seen Squaw island several times,
344 Mr. Safford? A. Yes.

Q. Are there industries, or is there any busi-
ness there from which the International Bridge
Company now receives an annual revenue? A.
None to my knowledge.

Q. So that if you built this addition you would
build it in expectation, upon the promises of the
people who owned the island as to what could be
developed on the island if the addition was built?

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A. That would appear to be the only prospect of business at this time. 345

Q. You have no contract of any kind that would assure you any business if you built the addition to the bridge? A. No, none at all.

Q. (The Court) There are no truck gardens on the island? A. Not to my knowledge.

Q. Is it equally practicable to construct the driveway arm on either side, south or north? A. Yes, unless there was some development that would make it difficult to construct the driveway on one or the other side which doesn't exist now. 346

Q. As a matter of fact the larger part of the island is south of the bridge, and therefore any development would be more likely to be on the side of the approach as to which would be the cheaper side to do the building for the reasons you have stated; that is correct, is it not? A. With the island in its present condition that would be correct. It is possible that some method of detail development might take place which would make it difficult from an operating standpoint to have the roadway on that side, but with the island in its present situation and condition it really is immaterial which side the wing is built. 347

Q. The map of course shows that the larger part of the island is south of the bridge? A. It appears to be, yes, and I believe that is true. 348

CROSS EXAMINATION by Mr. Ivins:

Q. (Presenting same) Mr. Safford, do you recognize this map? A. Yes.

H. R. Safford, for Deft., Cross.

349 Q. Will you tell the court what it is, please?

A. That was a sketch that was made at the suggestion of the Squaw Island Development Company to see what might be developed in the way of a siding track connection with the International Bridge Company's track.

350 Q. The map was prepared by whom, by which company I mean? A. It was prepared by the Division Engineer of the Grand Trunk.

Q. What is the relation between the Grand Trunk and the International Bridge Company?

A. Well, it has an interest in the International Bridge Company.

Q. Doesn't it own all the stock or all but the qualifying shares of the directors? A. I am not able to answer that accurately.

351 Q. It controls it anyhow? A. Yes.

Mr. Ivins: I offer that map in evidence.

Received and marked "Plaintiff's Exhibit A."

352 Q. You have been testifying in regard to an estimate that you prepared for constructing the roadway and a footpath across the bridge; I want you to describe that roadway and the footpath that you proposed to construct at those figures?

A. Well, the construction of the roadway is the use of the ordinary form of structural steel arm or bracket attached to the side of the bridge and extending outwardly sufficient to give a roadway of 16 feet in width; between these brackets the floor is supported in the ordinary way. An iron railing is put up alongside the outside to protect pedestrians from stepping off the side of the

H. R. Safford, for Deft., Cross.

road. Leading up to the west end of the bridge 353
there will be a graded approach built of earth filling,
paved with macadam, protected by a fence
and built on a five per cent. grade, that is, five
feet in 100; and on the east side, or the Buffalo
side, a similar approach will be built along the
west side of Niagara street, paved and protected
in the same manner.

Q. How great a stress did you allow that that 354
roadway would stand? A. I don't know as I
understand the question.

Q. I am not an engineer and I can't use your
technical terms, but I want to know how much of
a motor truck loaded with heavy materials would
that hold up; on what basis did you calculate in
determining the weight of the structural steel you
are going to use? You took into consideration 355
the load that this thing is expected to bear, didn't
you? A. Yes.

Q. And if it is going to bear a heavier load it
has to be built of heavier steel and is more ex-
pensive proportionately or in some ratio, it may
be in squares for all I know. On what basis did
you estimate your structure? A. I will have to
refer to my drawing to tell you that accurately.
(Referring to same). 356

Q. (The Court) He wants to know, as I under-
stand, what load the highway will sustain? A.
It was designed to support a moving load of 25,-
000 pounds on four axles, each spaced in pairs,
five feet between each pair and 10 feet between
the two adjoining wheels.

Q. When you were making these plans didn't

H. R. Safford, for Deft., Cross.

357 you have in mind running a trolley line across there? A. They were made with the expectation that within the life of the structure, such a load might be put on the bridge.

Q. But if there was no such expectation you wouldn't have had to make the bridge quite so strong, would you; it wouldn't be necessary to have the bridge so heavy? A. Well, at the time
358 these plans were made the automobile trucks had not been developed, of course.

Q. (The Court) Would it require that to sustain it? A. I don't think it would require quite as much metal if a trolley car was not put on the bridge.

Q. So the cost of building it, not allowing for trolley cars, would be less than your estimate? A. I think it would be some less, without having
359 made a calculation to determine it.

Q. The cost of building a roadway and foot-path 12 feet over all in width, instead of 16, that would be considerably less too, wouldn't it? A. It would be some less; not considerably less.

Q. In making your calculations you have allowed at certain rates for structural steel put up; isn't that the method? A. Yes.

360 Q. They were the market rates for when? A. They are the market rates at the present time.

Q. Are you familiar with the market rates for the past some little time? A. Yes.

Q. Can you tell how those market rates would compare with the market rates for the same thing—

The Court (Interrupting): Haven't we

H. R. Safford, for Deft., Cross.

got to deal with the present, Mr. Ivins? 361

Mr. Ivins: I think we have got to deal with the time the act took effect. The act took effect last year, and it gave the bridge company six or seven months' time to do the work before the penalties would occur.

Q. Structural steel was considerably less in April, 1915, and through the summer than it is now, wasn't it? A. It was some less, yes. 362

Q. You spoke of the cost of land for these approaches and based your figures on what Mr. Moot called the actual purchase cost; purchased when and by whom and from whom? A. I can't tell you. I can't answer that.

Q. Where did you get the figures? A. It was purchased before I came with the road, and I am not familiar with the rate.

Mr. Moot: It was purchased for our office, Mr. Ivins. It is held subject to the demands of this company. Those figures are the actual figures. 363

Mr. Ivins: I move to strike out Mr. Safford's testimony with regard to the value of that land. He doesn't know anything about it.

Mr. Moot: We will have to prove those figures if you require it. We will show the actual cost of these two pieces of land. We have furnished the figures to Mr. Safford and if they require us I can get the actual date from my office, or I can testify to it myself. 364

The Court: It may go out. Mr. Moot is going to give you the actual figures.

H. R. Safford, for Deft., Cross.

365 Q. Mr. Safford, are you familiar with the neighborhood of the Buffalo end of the Black Rock draw? A. Yes, as familiar as I can be by being on the ground a number of times.

Q. And with the surroundings? A. Yes.

Q. It is pretty well built up around there, isn't it? A. It seems to be fairly well developed.

366 Q. Now what kind of buildings are there in that neighborhood, is it a residential section or factory section or what kind? A. Why, I have observed industrial plants and residences and railway buildings.

Q. How far is it across Black Rock, across your bridge? A. The length of the bridge you mean, do you?

Q. Yes. A. (Referring to map) Approximately 432 feet.

367 Q. The island part of Squaw island, that part of which photographs have been offered in evidence, is all high and dry land, isn't it? A. No, sir; I wouldn't say it was high and dry land, for I have seen it under water; I have seen portions of it under water.

Q. At flood times? A. Yes.

368 Q. I have seen the water rise over 24 feet in a night at Montreal? A. I wouldn't class it as high and dry land. I wouldn't class any land as high and dry land that is subject to overflow.

Q. How does it compare with the land you have just testified in regard to on the Buffalo side, in respect to the height above water level? A. It is some lower than that land.

Q. Is there any means of access that you know

H. R. Safford, for Deft., Cross.

of to Squaw island, other than the International Bridge Company's bridge? A. There is a bridge over the canal at Ferry street which it is my impression enables access to be obtained to Squaw island along sort of a levee. 369

Q. That levee is part of the harbor works of the Federal Government, isn't it? A. I can't say as to that.

Q. Do you know whether that Ferry street bridge you speak of is a highway? A. It is my recollection that it is. 370

Q. That causeway or means of access over the Ferry street bridge to the body of Squaw island, will you describe that? Isn't it a sort of a break-water? A. It has been a long time since I went over it.

The Court: Haven't you some way of showing exactly the real situation there? 371

Mr. Ivins: I will have Mr. Taylor on the stand later to explain it.

Q. Do you know anything about the sand or gravel on Squaw island? A. No, sir.

Q. Do you know the tolls that the International Bridge Company now charge for railroad cars taken across this bridge? A. No, I don't believe I can repeat them. 372

Q. Does the International Bridge Company own any engines or cars itself? A. Well, I don't know that I can speak accurately as to that. It operates a motor car now, whether it owns it or not I don't know. I don't know that I have ever had occasion to make an examination as to that.

Q. What kind of a car is that, a freight or passenger? A. It is a passenger motor car that runs between Bridgeburg and Black Rock.

H. R. Safford, for Deft., Cross.

373 Q. Does it run regularly for the carrying of paying passengers or is it operated for the convenience of the companies? A. It runs on schedule.

Q. It takes passengers regularly? A. It takes passengers, yes.

Q. Do you know what the fare is that is charged? A. I understand it is five cents. I have never had to pay it myself and I am not entirely sure.

374 Q. Are you familiar at all with the financial end of the International Bridge Company? A. No, not in detail.

Q. Do you know anything about its earnings? A. No, sir.

Q. Have you in your possession any statement that you believe to be true of the earnings of the International Bridge Company in the last two years? A. No, sir.

Q. Can you tell me who are the officers of the company having charge of the finances? A. I think Mr. E. J. Chamberlain is president.

Q. How about the treasurer; do you know who the treasurer is? A. I think Mr. Frank Scott is treasurer.

Q. And the secretary? A. I believe Mr. George W. Alexander is the secretary.

376 Q. Do you know where those gentlemen reside? A. Yes.

Q. Where? A. Mr. Chamberlain resides in Montreal. Mr. Scott resides in Montreal. Mr. Alexander resides in Detroit.

Q. Do you know where the books of account of the company are kept? A. No, I do not.

Q. (Presenting same). Wasn't this map, plain-

H. R. Safford, for Deft., Cross.

tiff's Exhibit A, prepared by you as the result of 377
negotiations in which you took part, representing
your International Bridge Company, with Messrs.
Kellogg, Knowlton and Worden in Buffalo? A.
This map was prepared at the request or sugges-
tion of one or both of those gentlemen, that some
investigation be made to see whether a connection
could be made in a practical manner with the
tracks of the International Bridge Company, to 378
serve a projected development.

Q. Do you know anything about the projected
development? A. Why, I was given some infor-
mation by those gentlemen upon it. It was very
general, not specific.

Q. Mr. Safford, will you tell me about where
on this map the International boundary is? A. I
think it is about in the middle of that channel
opening or draw span. 379

Q. Somewhere in the draw span? A. My
recollection is somewhere in the draw span of the
main river bridge.

Q. In the conferences you had with Messrs.
Kellogg, Knowlton and Worden do you remember
the figures you gave them as the probable total
cost of overhead and maintenance of this proposed
structure? A. Well, not very distinctly except 380
that I gave them an approximate, a tentative esti-
mate of the cost of maintaining the roadway and
employing toll collectors; somewhere around
\$4,000 a year.

Q. Are you familiar with the water front of
Buffalo at all? A. Well, that is a rather hard
question to answer. I don't know to what extent
you mean as being familiar.

H. R. Safford, for Deft., Cross.

381 The Court: He says at all. I could answer that and say yes.

A. I have been around it.

Q. I want to know if you can tell the court what the situation is in regard to vacant lots on the Buffalo water front available for building factories and mills and industrial developments? A. I don't think I could give you a very specific answer to that question.

382 Q. Can you refer to your map and let us get on the record the dimensions, that is, the length of the Black Rock draw, the length of the embankment across Squaw island and the length of the bridge across the main channel? A. That is not a map prepared by me. The length of the Black Rock draw is 431 feet, 6 inches. The distance across the island between the bridge ends is 1167 feet. The length of the main river bridge is 1895 feet.

383 Q. (Presenting same) I show you defendant's Exhibit 31-A. In the background, in the distance there appears a number of buildings which appear to me to be industrial structures?

The Court: All on the mainland, aren't they, and not in the island?

384 Mr. Ivins: That is so; they border right along the river.

The Court: They are all on the mainland and all show in the photograph except the shacks or boathouses owned or said to be owned by squatters. There are no other buildings on that island. They are all on the mainland. He mentioned that in order to clear it up, because they appear to be on

H. R. Safford, for Deft., Re-direct.

the island, but as a matter of fact they are 385
on the mainland.

Mr. Ivins: That was the reason for mentioning it in the direct examination. The reason I mention it now is I want to show that they are right along the edge of the mainland, along the harbor, just 400 feet across the river.

The Court: You have got the width of the river and they are right on the edge of the mainland as I understand. 386

Mr. Ivins: It won't be necessary to go into the rest of them.

Q. The Black Rock draw in this construction has abutments which are wider than the present bridge structure, has it not? A. Yes.

Q. They were built to take care of this extension if it should be built, the roadway? A. I believe they are practically wide enough to enable that roadway to be accommodated, although I might say that the abutment itself does not have to be extended to enable this roadway to be built, because the roadway doesn't rest on the abutment. The roadway rests entirely on the bridge. 387

Q. The abutment would support the approach that would be built to carry the road to the bridge? A. Yes, the back wall of the abutment would help to do that. 388

RE-DIRECT EXAMINATION by Mr. Moot:

Q. Counsel suggests that steel costs less on January 1st, 1916, than it does now, and that this addition to this bridge, whichever side it might be constructed, would cost less on January 1st, 1916

H. R. Safford, for Deft., Re-direct.

389 than it would now? A. May I interrupt just a minute?

Q. Certainly. A. His question asked me with reference to the price in January, 1915, not 1916.

Mr. Ivins: It wasn't in January. It was along after the passage of this act, in April, 1915.

390 The Witness: I understood you to say January, 1915, in your question.

Mr. Ivins: I meant a little over a year ago at the time this act was passed.

The Court: Why wouldn't it be January, 1916, because that is when the penalties began to run.

391 Q. About what difference would it make in this estimate of the cost of the addition to the bridge that you have given us if you had made your estimate as of the last day of December, 1915, instead of today? A. Well, I don't believe I can answer that without reference to our records to see what the market price of that class of material was of that date. I think there has been some slight increase since that time. I don't think it has been heavy, but I wouldn't attempt to answer that accurately without consulting our records.

392 Q. This is all approximate, this is all an estimate, so I don't care about an absolutely accurate figure, but I want an estimate that will not give the State the worst of it; I want you to be fair to the State? A. If you will let me have a few minutes to consult with my structural engineer, who is a little more familiar with current prices than I am, I can give you that.

H. R. Safford, for Deft., Re-direct.

Mr. Moot: I will stipulate right on the 393
record that the Grand Trunk owns all the
stock in the International Bridge Company
except the qualifying shares of directors.

Q. Are you in a position now, Mr. Safford, to 394
tell us about how much your figures, as a whole,
will be cut down if you answered as of the 31st of
December, 1915, the last day we had before penal-
ties began to run against us? A. It would be be-
tween \$750 and \$800 less than the estimate here
given, if the contract had been made at that time.

Q. That \$750 or \$800, does that cover every-
thing or just some one thing? A. Just the steel
on the bridge itself.

Q. It would be that much less on the steel? A.
Yes, sir, that much less on the steel.

Q. Can you approximate it with reasonable 395
closeness as a whole and say, taking that into ac-
count as a whole, it would be so much less on one
side and so much less on the other if we built it
at that time instead of at the present time? A.
It wouldn't affect the relative difference.

Q. That I appreciate, but I mean on the gross
figure that you gave of the cost on one side, which
was \$44,778.92, and on the other side, which was
\$56,071.12? A. That difference of between \$750 396
and \$800 would be the same on both sides.

Q. That would be for steel alone? A. For
steel alone.

Q. Now look at your other items and then tell
me how much difference, if you take it back to De-
cember 31st, it would make as a whole, how much
cheaper it could have been built if it had been fin-
ished by that time than it could be if it was finish-
ed now? A. Between \$750 and \$800.

H. R. Safford, for Deft., Re-direct.

397 Q. In other words, the other items would remain substantially the same? A. The other items would remain substantially the same.

Q. Then or now? A. Then or now, yes.

The Court: That is for the painting and planking and such things?

A. Yes; those items would remain substantially the same.

398 Q. I suppose that would be substantially true anywhere back in 1915 up to April or May, wouldn't it? A. Yes, sir, I think so. The increase in the price of steel might have started a little previous to the 1st of January; it might have started some time during the fall of 1915. That I can't speak on accurately.

399 Q. You were asked about the difference it would make to not plan for trolley cars, but just for auto trucks and heavy vehicles such as are in use today, and you said it would cost something less? A. Yes, sir.

Q. Can you approximate how much less? A. No, I don't think I should try to approximate that without study.

400 Q. What would be substantially the difference in the load? A. Well, I hardly feel like answering that because the development of the auto truck today has reached a point where I want some opportunity to see what the maximum weights of the cars are that are now being turned out.

Q. In other words, if you were going to build a bridge today, or if you had built it last year you wouldn't build it with reference to the auto trucks of today, but with reference to the development that is apt to occur in the future in auto trucks?

H. R. Safford, for Deft., Re-direct.

A. We would do as we always do in the construction of a permanent bridge, anticipate the load increases that are apt to take place within the life of that structure. 401

Q. You spoke of trolley cars; trolley cars now run right down Niagara street? A. Yes.

Q. And cross the tracks on Niagara street only a few hundred feet from the easterly end of this bridge? A. Yes. 402

Q. So that if you built your foot and vehicle bridge to Squaw island it would only require laying a short distance of tracks to take the trolleys right from the heart of Buffalo right over to Squaw island? A. Yes. It would be very very unwise to construct a bridge of this character, a permanent construction, without anticipating that the maximum street load, the maximum loads which are apt to take place in a street would not be taken across that bridge within its life. 403

Q. Did you provide in your planning or in your figures for anything more than the maximum street load in this addition? A. We did not.

By the Court:

Q. This plan that was prepared in connection with the Squaw Island Development Company only related to the construction of a highway as far as Squaw island? A. That is all. 404

Q. There was some thought in somebody's mind with reference to trolley cars in connection with Squaw island? A. I had better make that clear by saying that the plan that I have referred to, judge, was not made by me; it was made by my predecessor when this bridge was built.

H. R. Safford, for Deft., Re-cross.

405 Q. I say it was made by somebody who
thought— A. It was made not with the special
view of serving the Squaw Island Development
Company. It was made in view of expected con-
ditions some day being reached of requiring a
driveway on that bridge, and of course it is the
custom always in building an expensive perma-
nent bridge of this kind to build it of such strength
406 so that it can take care of conditions which might
be expected to occur in the future.

Q. The viaducts and bridges on the main line
of a railroad are built to sustain very much larger
loads than those now being imposed upon them at
the present time? A. Yes.

Q. But I understood you to say that it was
with reference to someone's suggestion who had
in mind a Squaw island development that the plan
407 was drawn showing a highway on it? A. No; I
think what was intended by the plans that were
prepared was a side track to be connected with the
International Bridge Company track to accommo-
date this supposed sand and gravel bed. This plan
does not show that highway arm; it shows a side
track only.

408 By Mr. Moot:

Q. That was recently made? A. This was a
recent plan.

Q. Prepared in this year? A. I think within
the last few months.

RE-CROSS EXAMINATION by Mr. Ivins:

Q. I want to get on the record whether or not
you think the construction, if begun on the 1st of
June, 1915, would have been cheaper than at the

H. R. Safford, for Deft., Re-direct.

prices as they were on the 31st of December, 1915? 409

A. Why, I said it was my impression there had been some slight increase in steel between the early fall of 1915 and the 1st of January, 1916. I can't support that by actual quotations.

Q. I also want to get on the record what railroad companies connect up and run across the bridge, if you know? A. The Wabash, the Michigan Central and the Pere Marquette.

Q. (Mr. Moot) And the Grand Trunk? A. And the Grand Trunk. 410

Q. Does the Pennsylvania go one way? A. I don't think you can say that the Pennsylvania railroad really operates over the bridge. There is some reciprocal arrangement about the interchange of cars and that their engines sometimes go over there, but they have no line into Black Rock. 411

RE-DIRECT EXAMINATION by Mr. Moot:

Q. Any possible increase in expense between June 1st, 1915, and December 31, 1915, would be covered by a very few hundred dollars in the cost of the addition? A. Why, approximately so. There might be \$150 or \$200 difference.

Q. I say a few hundred dollars would cover it? 412
A. Oh, yes, a few hundred would cover it.

Mr. Moot: Mr. Ivins, I have a telegram from my office stating that the photographs that are identified by numbers were taken April 19, 1915, and the photographs that are not identified by numbers were taken January 14, 1916.

Mr. Ivins: I am willing to stipulate that on the record.

A. Moot, for Deft., Direct, Cross.

413 ADELBERT MOOT, sworn for defendant, testified as follows:

414 More than 20 years ago either the International Bridge Company or the Grand Trunk Railway Company furnished Moot, Sprague, Brownell and Marey, their attorneys, with the money to buy land both southerly and northerly of the existing International bridge on the Buffalo side of Niagara river. The land on the southerly side cost \$13,200, and the land on the northerly side cost \$26,000; the title being taken in some individual, I think Mr. H. A. Taylor, in the interest of the company.

CROSS EXAMINATION by Mr. Ivins:

Q. Do you remember that? A. I do.

415 Q. Would you have remembered it without refreshing your memory from that slip? A. Yes, because I remember many of the negotiations and many of the different individuals who held the land, and I remember some of the reasons why they sold cheap.

416 Q. Can you give us a description of this land? A. Only in a general way, that it was between Niagara street and the harbor northerly and southerly of the bridge at the easterly end of the bridge and running a considerable distance up and down Niagara street.

Q. Have you got any idea of the area contained in it, how much of that land there is? A. Well, I remember only this much on that point, we bought some of that land as low as \$56 a foot front; indeed, I think we bought some of it still lower than that, as I think of it now.

G. A. Ricker, for Pltf., Direct.

Mr. Ivins: I move to strike out Mr. 417
Moot's testimony on the ground that there
is nothing in the record or in the evidence
to show how much land there was and how
much of this land is necessary for these ap-
proaches, or what part of such land is nec-
essary for these approaches.

Motion denied. Plaintiff excepted.

Defendant rests.

418

GEORGE A. RICKER, sworn for plaintiff,
testified:

Examined by Mr. Ivins:

Q. Mr. Ricker, what is your business? A. 419
Civil engineer.

Q. How long have you been a civil engineer?

A. About 30 years.

Q. Where is your office? A. 110 State street,
Albany.

Q. Have you had considerable experience in
Buffalo? A. Yes. I was in practice there for
upwards of 25 years.

420

Q. (Presenting same.) Do you recognize this
map? A. Yes.

Q. Will you describe it? A. It is a sketch
plan showing the possible development of Squaw
island, with slips and railroad switches connecting
with the Grand Trunk railroad.

Q. Did you make it? A. I did.

Q. When? A. In February, 1913.

G. A. Ricker, for Pltf., Direct.

421 Q. At whose instance? A. Mr. Kellogg's.

Mr. Ivins: I offer it in evidence.

Received and marked "Plaintiff's Ex.
B."

Q. Mr. Ricker, would it be practicable to develop Squaw island into a location for industrial development, factories and mills and such, with water and railroad connections?

422 Mr. Moot: I object to that on the ground that the possible and practical development of an island like this should not be a sufficient support for legislation to force someone to build a bridge to promote that development.

Objection overruled. Defendant excepted.

A. Yes.

423 Q. Will you explain to the court just what the general proposition in the proposed development was at the time you made this plan? A. The general scheme of this plan was of slips cut into the island from the Black Rock harbor side at an angle which would permit of ready access for spur tracks from a stem or main line of tracks running along the river front of the island. Connection is made with those tracks, which are on the low level of the island, by tracks connecting with the
424 high level tracks of the Grand Trunk railroad and curving to the level on a trestle, and gradually approaching the ground at the southerly end of the island. The spur tracks leave the main line of the railroad here (ind.) at the high embankment and swing around until they come parallel with the general direction of the river and go down on

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I think it was a one per cent grade until they reach the ground level, then the switchback from those tracks had connections into the land beside the slips, and were made as shown. 425

Q. Now in general how much would the slips aggregate in length? A. The longest slip is about 1300 feet in depth, the shorter one is 600 feet in depth.

By Mr. Moot:

426

Q. By depth you mean from the railroad? A. I mean in length.

Q. Not depth of water? A. No, in length of slip. About 4000 feet in length of slips, or approximately a mile and a half of dockage.

By Mr. Ivins:

Q. And approximately how much land is there between these slips for the construction of buildings or warehouses? A. The width between the slips is 400 feet. 427

Q. Each? A. Each, yes.

Q. I notice on your plan to the north of the railroad embankment some spur tracks lead out in a narrow formation; will you explain that? A. Well, that is merely suggested as a possible way of using that land, which is not so located that it can readily be served with a slip. Entrance to that property from the water would have to be from either the river channel or the slip channel. Those switches are laid out there merely to indicate that switches may be swung into that land so as to make it available for freight transfer. 428

Q. Would the plan which was prepared by the witness for the defendant, Plaintiff's Exhibit A, be possible to work in with your plan?

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429 Mr. Moot: I take it I don't need to keep objecting; my point is already raised?

The Court: Yes.

A. Why, yes, connection could be made with these slips from the tracks as shown on that plan, Exhibit A, but it would not be as convenient or as desirable an arrangement for the service of the larger part of the island.

430 By Mr. Kellogg:

Q. Mr. Ricker, what is the island composed of; you are very familiar with Squaw island, are you not, and its composition? A. Yes. The whole island is a deposit of gravel.

Q. Gravel of a high commercial quality? A. Yes.

431 Q. You have tested it? A. Yes; it is a very excellent gravel, clean and very desirable for use in concrete. Because it has been deposited by flowing water it is washed clean and it is a fairly uniform run of material.

Q. What is there, if you know, about the depth to rock from the surface of that island? A. My recollection is it is about 40 feet. It is some years since I made any—

432 Q. (Int'g.) You have for many years worked in connection with that island in various ways? A. Yes; I made plans for the development of the island as far back as 1894, and at that time made borings to determine the depth.

Q. At that time there was no channel in Black Rock harbor which carried lake vessels? A. No, sir.

Q. Your docks come in the other way from the

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river? A. The plan at that time contemplated an entrance to the slips from the river side. 433

Q. In the river there is a heavy current, is there not? A. Yes.

Q. How many miles an hour, about seven or eight?

Mr. Moot: From six to twelve.

A. I placed the maximum current to be about seven miles through the draw. 434

Mr. Moot: I speak of the official government records, they say it is from six to 12.

The Witness: There may be exceptional times when the current runs as high as that, but the average maximum would be about seven through the draw at ordinary stages of the river.

Q. Black Rock harbor commences now at the government lock, does it not, at the lower end of Squaw island? A. Yes. 435

Q. A ship lock? A. Yes.

Q. Capable of docking any of the vessels of the Great Lakes? A. Yes.

Q. And the water in Black Rock harbor is the level of Lake Erie, is it not? A. Yes.

Q. And that is how much higher about than the river at that point? A. Approximately five feet. 436

Q. And the water in Black Rock harbor is practically slack water? A. Yes.

Q. You are familiar, are you not, with the other terminal facilities, lake, rail and canal, in Buffalo? A. Yes.

Q. (Presenting same). I show you a map which purports to be prepared from the United States Engineer's maps, showing the entire water

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437 front of Buffalo; do you recognize that map? A.
Yes.

Q. Do you know what it is? A. Why, it is a map showing the entire water front of the City of Buffalo, with certain signs indicating industrial development and the present occupation of the lands.

438 Q. On this map is shown here Squaw island and the International bridge? A. Yes.

Q. And all the other frontage clear down the river to Tonawanda? A. Yes.

Q. Of the water front in Buffalo suitable for Great Lake terminals can you say roughly how much of it remains in private hands below the Michigan street bridge and Buffalo river?

439 **Mr. Moot:** I don't see how that is competent. If you want to put the map in evidence, I won't object to that, and let it speak for itself.

Mr. Kellogg: I will withdraw that question.

440 Q. Starting on this map at Squaw island, Mr. Ricker, what is the condition of the American shore, that is, the mainland shore, at the end of the bridge, as compared to the level of the harbor; I don't mean how many feet; is it on the level with the harbor or up in the air? A. The ground of the mainland?

Q. Yes, where the bridge ends? A. Why, it is about 12 to 15 feet higher than the water in the channel.

Q. Now next to that a short distance, almost at the end of the bridge, is Niagara street, is it not? A. Yes.

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Q. One of the thoroughfares in the City of Buffalo? A. Yes, sir. 441

Q. And some years ago that thoroughfare was depressed, was it not? A. Yes.

Q. And carried under the International bridge? A. Yes.

Q. On either side of the bridge, to the north and to the south, along the west side of Niagara street are strips of land, are there not, with a retaining wall up to the level of the bridge? A. Yes. 442

Q. And tapering off down into Niagara street on either side of that bridge? A. Yes.

Q. I refer again to this map, Plaintiff's Exhibit A, and call your attention to the design on there in yellow showing a roadway; does that represent, as you remember it, the graded connection with Niagara street over the lands of the International Bridge Company, or controlled by them in some way? A. Why, it appears to represent its approaches, and is marked on this map "roadway." 443

Q. You were living in Buffalo at the time the construction of the grades between Niagara street and the International bridge took place? A. Yes. 444

Q. Is it true or is it not true that at that time these roadways on both sides of that bridge were practically laid out down to Niagara street and up to the bridge, I don't mean the surface, but the general grade up there with the walls on the Niagara street side? A. Well, the construction of the subway was coincident with the building of retaining walls which sustained the strip of land which

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445 is used for the roadway approaches to the property on the side of that street that was otherwise cut off by the depression.

Q. Could that land be used in any way that you can see as an engineer by the Grand Trunk Railway Company for any other purpose?

Mr. Moot: I object to that as purely speculation.

Question withdrawn.

446

Q. How low under the surface of the International bridge crossing is the level of Niagara street at that point? A. Why, about 13 or 14 feet.

447

Q. And along this whole piece of land here between Niagara street and the river down to the point where this retaining wall falls back into Niagara street again, the level of that land in between there has, on its eastern bounds, which is the western side of Niagara street, a sheer drop right into Niagara street ranging from nothing up to 14 feet or thereabouts in the middle, is that right? A. Yes.

448

Q. Can you tell me from that map how wide that strip is there from the harbor to Niagara street? A. Why, it isn't easy to tell what that is exactly. The drawing is rather rough and the scale is small. It would appear to be from 10 to 15 feet.

Q. Oh, no. A. You are referring to this strip marked "roadway" on here?

Q. Oh, no, I mean the whole strip from Black Rock harbor back to the west line on Niagara street, that whole strip in there (ind.)? A. Well, it is from 100 to 115 or 120 feet.

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Q. Is there any way that you can see as an engineer by which any of that strip could be utilized for railway purposes and get a track onto it without widening the crossing of Niagara street? 449

Mr. Moot: I object to that. It already appears in the evidence that the Niagara street tracks were depressed in the grade crossing improvements of Buffalo and that the lands as to which counsel is asking were acquired by purchase before that occurred. That being undisputed what has it to do with this case, as to whether the Grand Trunk or International Bridge or anybody else could or couldn't use these lands for anything except bridge purposes? 450

Objection overruled. Defendant excepted.

A. No.

Q. You couldn't make a curve on that land from the Grand Trunk right-of-way or the International Bridge Company right-of-way, could you? A. No. 451

Q. On either side? A. No.

Q. And handle big engines over it? A. No.

Q. So that as far as that bridge is concerned its only possible engineering use is for a roadway or an approach to a roadway to be built on that bridge, is that right? 452

Mr. Moot: Objected to as incompetent.

Objection sustained.

Q. What are the lake and rail terminals at Black Rock or in this part of Buffalo; are there any in the part of Buffalo where Squaw island is?

A. Well, there are some terminals across the

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453 Black Rock channel from Squaw island down the river, just north of the island, where there are industrial plants and tracks serving those plants.

Q. There are a number of industrial plants all along the river front? A. Yes.

Q. Served by other railroads than the Grand Trunk? A. Yes.

454 Q. Is there any way which the Grand Trunk, from the level of its bridge, can reach the level of Black Rock harbor on the New York shore without buying a lot of additional land? A. If I understand your question correctly, the Grand Trunk railroad is practically limited to its present occupation so far as the tracks across the island and across Niagara street is concerned.

455 Q. I was also calling your attention to the fact and asking you if it would be possible for the Grand Trunk railway to get down to the level of Black Rock harbor and get docks on Black Rock harbor inside of the New York Central tracks?

Mr. Moot: How does that affect the constitutionality of this law?

Question withdrawn.

456 Q. The International Bridge property and rails run only a short distance beyond Niagara street there, do they not? A. I think only a few hundred feet.

Q. Then they stop in a little yard there? A. Yes.

Q. And then into that yard land, connecting right with those rails, are the belt lines of the Lackawanna and Erie and New York Central, are there not? A. Yes.

Q. All connecting with the bridge at that point? A. Yes.

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Q. And all running around the city through the uncongested part down to the East Buffalo main line, is that right? A. Yes. 457

Q. In other words, with this railroad connection between Squaw island and the main line of New York and the main line of Canada you have a terminal point which can be reached by the Great Lake ships of the largest size and can be reached and must be passed by barge canal boats coming up from Tonawanda or the Erie canal and which is connected through that bridge with three belt lines to the east and on the island itself through running rights over the bridge with the Michigan Central, the Pere Marquette, the Wabash, the Grand Trunk, and I think to some extent, and if I am mistaken correct me, with the C. P. R. R. trains? A. Yes. 458

Q. All traffic lines to the west, not merely to Canada but to Detroit, Chicago and all the west? A. Yes. 459

Q. Do you know any other point in Buffalo that is so connected with the transportation systems of the country and is in private hands? A. No.

Q. At the present time what is the only great terminal point at which the grain and the vast mass of lake products are handled in Buffalo? A. The section indicated on the map by the Buffalo river and the city ship canal. 460

Q. That stream is how wide, do you remember? A. Why, from 200 to 250 feet.

Q. The whole length of it, clear back is lined, is it not, with docks to which these vessels tie up? A. Yes.

Mr. Moot: I don't believe Mr. Ricker

118

G. A. Ricker, for Pltf., Direct.

461 really means to swear as strong as that.

Q. I will call it as far back as Michigan street and for half a mile east of that it is lined by docks, is it not? A. Well, yes, and further than that; from the mouth of the river up to the foot of Hamburg street, just at the location of the Buffalo Union Furnace the river is lined solidly with elevators and freight houses and terminal properties.

462 Q. Flour mills like the Washburn-Crosby? A. Yes.

Q. And iron factories? A. Yes.

Q. And ore docks? A. Yes.

Q. All those things that are required to handle the commerce of the Great Lakes at the lower end? A. Yes.

463 Q. The vessels are about how wide, do you remember; I mean the big lake freighters? A. Oh, 60 or 70 feet, the larger ones.

Q. They lie on either side of this stream all the way up, do they not? A. Yes.

Q. It is a winding, twisting, dredged out creek, is that right? A. Yes.

464 Q. And when two of these vessels are laid up along opposite sides of that creek discharging their cargo the free space between them is pretty small, isn't it? In other words, the place is extremely congested, isn't that right? A. Yes, it is congested.

Q. Then again every little ways up that river are bridges, are there not, lift bridges and railroad bridges? A. There are several. There are two street bridges within the length that I indicated in the previous answer.

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Q. That is to the foot of Hamburg street? A. 465
Yes, and then above that there are several railroad bridges.

Q. This territory on the south side of— A.
(Int'g). The railroad bridges have not draw spans; the street bridges are draw spans; the railroad bridges are fixed spans.

Q. They have been changing them lately? A.
Well, possibly, since I was there. 466

Q. This space between the Buffalo creek, which runs along the lake shore inside, and the lake, is what is called the island, is it not? A. It is generally known as the island, yes.

Q. On this side, on the lake side, between the creek and the lake, inside the breakwater is a great strip of land running to the southern limits of the city? A. Yes.

Q. Can you say what the condition of that land is today? A. As to its ownership or its use? 467

Q. As to its use and its ownership generally?

Mr. Moot: I object to the ownership question.

The Court: Objection sustained as to the ownership.

A. The larger part of that frontage is unused for any industrial or docking purposes. It lies on the beach front back of the breakwater and has not been developed for any commercial purposes. 468

Q. For years that frontage on the lake shore has been a subject of litigation between the railroads and the City of Buffalo, has it not? A. Yes.

Q. It is what is called the Hamburg turnpike litigation? A. Yes.

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469 Q. About halfway south from the river where it bends back east here— A. (Int'g). From the Ohio street bridge.

Q. (Cont'g.)—to the southern end of the city is what is known as Tift farm, is it not? A. Yes.

Q. That is occupied by the Lehigh Valley railroad as a freight terminal? A. Yes.

Q. The westerly terminal of the Lehigh Valley lake trade? A. Yes.

470 Q. Do you know how large a tract that is? A. I don't recall; it is several hundred acres.

Q. That is all being developed by the Lehigh Valley for their lake terminal business, is that right? A. Yes.

Q. And it is used by them for that purpose? A. Yes.

471 Q. Taking all things into consideration and your knowledge of conditions in Buffalo can you see any reason why Squaw island does not form an ideal site for a lake, rail and barge canal terminal, and a site for flour mills and all sorts of manufacturing concerns requiring those facilities, and warehouses, elevators and all sorts of facilities for the handling of this vast traffic?

472 Mr. Moot: I object to that as incompetent and improper.

Objection overruled. Defendant excepted.

A. If I remember the form of the question, the answer is no. I have proven my faith in Squaw island by investing a good deal of time and money there, for which I never received any adequate return.

Q. That was before my time? A. Yes, that is true. The answer to that is yes.

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Q. You were in the State Highway Department, were you not? A. Yes, I was first Deputy Commissioner of Highways under John Carlisle. 473

Q. While there, did you test out the gravel taken from the Niagara river in the neighborhood of Squaw island? A. I tested and used a great deal of it.

Q. What gravels in the State of New York did the Public Highway Commission, when you were there, permit to be used in cement work in the state highways? A. Only washed Niagara river gravel. 474

Q. Referring to this plan of improvement on Squaw island, made for the Squaw Island Freight Terminal Company, Inc., by you, the plan contemplated doing what with the surface of the island? A. Why, bringing it up to a level as high as was necessary and permissible for docks, building on the Black Rock harbor side, and at the same time leaving sufficient head room for vessels under the tracks of the Grand Trunk railroad. 475

Q. And that height was about four feet above the level of Black Rock harbor, was it not? A. No, my recollection is it was about seven feet above the level of Black Rock harbor. 476

Q. In other words, those slips to be carried in here would of course be at the level of Black Rock harbor and not at the level of the river? A. Yes.

Q. And the docks had to be a certain level? A. The docks needed to be six or seven feet or thereabouts above the water level. The water in

G. A. Ricker, for Pltf., Direct.

477 those slips was of course the height of the water in the Black Rock harbor, from which they were run in.

Q. And that excavation of these canals and of the land in here (indicating) in front of the island to the harbor would have made all that filling, is that right? A. Yes.

Q. According to your calculation? A. Yes.

478 Q. Black Rock harbor is not a slip, is it; vessels are not allowed to tie up anywhere in Black Rock harbor, in the channel of Black Rock harbor back to Lake Erie, are they? A. I don't know the regulations about that.

Q. That channel starts at Lake Erie and is a Government channel? A. It is a Government channel maintained at a given width throughout and would be subject to the rules of the Government as to such channels; what they are I am not familiar with.

479 Q. Do you remember the width and depth of that channel? A. 23 feet in depth and my recollection is that the channel is 200 or 210 feet wide, and the channel lines do not extend to the dock lines; the abutting dockage would have to maintain its own depth of water to the channel, so that the channel is constructed for channel purposes.

480 Q. In regard to the connection of Squaw island with the mainland via the sea wall strip and Ferry street, will you describe that connection; is there any roadway there? A. That is nothing more than a wall, a breakwater, which separates the Black Rock harbor channel from the Niagara river; it is a dam because most of the distance the water inside is probably four to five feet

G. A. Ricker, for Pltf., Cross.

higher than the water outside, and it is a narrow 481
place on which there is a rather ragged, dangerous
footpath, but there is no driveway or other means
of passage.

CROSS EXAMINATION by Mr. Moot:

Q. The water in Black Rock harbor comes
from the upper end of Niagara river where it be-
gins to leave the lake and go down the river? A. 482
Yes, in back of what is known as the north break-
water.

Q. And there for this Black Rock harbor there
is an intake, you might call it, to the river and the
water flows along down back, confined by this brick
wall that is between the river and the harbor; it
flows along down inside of that brick wall on the
one side and the land on the other, making a chan-
nel or harbor which is called Black Rock harbor? 483
A. It is a wall, but it is not a brick wall.

Q. It is a wall? A. It is a wall; it is not a
brick wall.

Q. To handle the thing there is a lock neces-
sary in the course of your Black Rock harbor
there to lock vessels through, etc.? A. Yes.

Q. That part of the stream that makes this
Black Rock harbor originally was a natural part 484
of the river and had its flow back into the river
until engineers fixed it so as to make a harbor out
of it? A. Yes.

Q. In other words, it is a part of Niagara river
which the government has impounded, so to speak,
and improved for harbor purposes? A. Well, it
was first done by the State for the improvement of
the Erie canal.

424
G. A. Ricker, for Pltf., Re-direct.

485 Q. And then when the Government took it over and got the deed that has been put in evidence here and went on and improved it further by these appropriations that are in evidence, as I say, to make it all kind of a harbor? A. Yes; it was a State waterway with a guard lock connecting the Erie canal just below where the International bridge now stands.

486 Q. By a State waterway you mean that the State used it in the beginning to feed the Erie canal through this guard lock? A. Yes; well, it was the Erie canal as I understand it.

Q. When the State turned it over to the Government by this deed that has been put in evidence then the United States Government made these improvements making Black Rock harbor as we call it? A. Yes.

487

RE-DIRECT EXAMINATION by Mr. Kellogg:

Q. The new State barge canal, where does it end? A. Tonawanda.

488 Q. That is how far below this point of Squaw island? A. Oh, between four and five miles; I am not sure but what it is a little more than that; I guess it is. The canal barges are intended to come up the river and come through this lock because the section of the old lock from Black Rock to Tonawanda has not been improved.

Q. In other words, on their way to Buffalo and the present harbor they will have to pass by Squaw island in this channel? A. Yes.

R. W. Lytle, for Pltff., Direct.

ROBERT W. LYTLE, sworn for plaintiff, testified: 489

Examined by Mr. Kellogg:

Q. Mr. Lytle, you live in Buffalo? A. Yes, sir.

Q. And are and have been for many years a practicing attorney in Buffalo? A. Yes, sir. 490

Q. During that time you have been a boatman also, have you not? A. Yes, sir.

Q. And have known and are familiar with the conditions at Squaw island? A. Yes. I have been the owner of a boathouse on Squaw island for about 21 years and got quite familiar with the situation there.

Q. Just tell the court what you know about the use of that island by boat owners and by the public and all that during that period of time and coming down to the present time? A. The island is conveniently located for boating and fishing purposes. I built a boathouse there in 1894 I think, or 1895, at a cost of four or five hundred dollars, and purchased a launch, a small boat, and we have used that for recreating purposes for the last 21 years. There are about 100 to 125 boat-houses on the island, located on the west and east side of the island, a great many of them have gasoline launches, most of them have row boats, and they use the island as kind of a headquarters for boating and fishing and general recreation. On the west side of the island, north of the International bridge, there are about 45 to 50 boat-houses, over half of them have channels and these 491 492

R. W. Lytle, for Pltf., Direct.

493 channels are storing places for gasoline boats
that cost anywhere from \$100 to \$3,500. The
boathouses themselves range in cost from about
\$25 to \$1,500. On the east side of the island, north
of the International bridge, there are about six or
eight boathouses. Mine is located in that locality,
and they are used for the same purpose. On the
east side of the island, south of the International
494 bridge, there are about 30 to 40 small boathouses,
some of them have row boats, others have sail
boats, and I think about probably two-thirds of
them have gasoline launches. Part of the island
north of the International bridge, or where the em-
bankment connects the harbor bridge with the
river bank is practically level ground and is
used for baseball and for football. Years ago
when we could get across the lock there conveni-
495 ently—

Q. (Indicating.) Explain that, about that old
passage? A. Five or six years ago and before
that time we found little or no difficulty in going
across to the island. We passed over what we
called the old canal lock; that lock was at the foot
of Bridge Street; it was a small lock, about 125 or
150 feet long, and about 40 feet wide, and had two
496 gates, and those two gates had walkways on the
gates; you could walk back and forth at any time,
night or day; one of the gates was always closed.
We had constant access there. After the new ship
lock was built they dredged that entire lock out,
and since that time we have had no convenient nor
safe access. One means of access is over Ferry
street and over the Ferry street bridge, but that is

R. W. Lytle, for Pltf., Direct.

about a mile and a quarter or a mile and a half 497
from the greater part of the boathouses, they being located mostly north of this embankment that connects the two sections of the bridge. Another access is over the International bridge itself, the part that crosses the harbor. In crossing that bridge we cross between two railroad tracks on a narrow plank about eight or ten inches wide, and it is dangerous in my judgment. The other 498
access is over the lock itself, over the new United States lock, but in going over that lock we go about three or four thousand feet out of the way, we have to pass way down the lock to the gate and then cross the lock and then back up on what we call the arms, these long extensions, I have forgotten the technical name for them, we have to walk on the top of that wall back to the island and then around. There is a small ferry 499
that runs from the foot of the bridge across where the old lock used to be; that is a small scow about six feet wide and about 20 feet long, and it has a stairway built right from the scow; the stairway is about nine feet high in order to accommodate the passengers. You have to step from this wall to the stairway and then walk down the stairway into the scow; the whole thing 500
is in unstable equilibrium all the time and is in constant danger of turning over. That scow of course is run only during pleasant weather, and when there is ice or high wind or high water the ferry ceases operations.

Q. Mr. Lytle, some of the people on the island live there the year around, do they not? A.

R. W. Lytle, for Pltff., Direct.

501 Yes. On the east side of Squaw island, north of the bridge, there are eight or nine dwellings occupied the year around by families. On the south side, from the bridge down to the head of the island, or the south end of the island, there are about 12 or 14 more dwellings, and they are all occupied the year around. Some of those families cross the harbor at Ferry street and
502 others cross the International bridge by permission of the International Bridge Company; some go across in small row boats; others cross on the ice in the winter time, when the ice is thick enough and safe enough, and as I say during January, February, March and April the Government allows them to cross on the lock.

Q. While in Niagara street immediately across the bridge yard is one of the main double track trolley lines of the city? A. Yes.
503

Q. And the moment you hit Niagara street you can go anywhere you want to? A. Anywhere you want to, north or south.

Q. Wasn't there a house on the river side too, quite a large place, that was occupied the year around? A. On the west side?

Q. Yes. A. I don't know; I have seen families over there quite early and quite late; as early as April and as late as December, but whether they stayed there during January and February I don't know.
504

Q. Aside from those on the Government grounds, here on the edge of the Government lands here do you know anybody on the island that is a squatter, that doesn't have a lease and

R. W. Lytle, for Pltf., Direct.

pay rent? A. No; all that I know of pay rent; 505
some to my own knowledge pay rent and they all
tell me they pay rent. I have that from hear-
say. I pay the rent for one or two of them; I
pay it to you or to your office, and I pay for my-
self.

Q. You know we give you a lease from year 506
to year subject to cancellation, a written lease,
which you sign for \$1 a foot front? A. Yes;
for the past 10 or 12 years we have been paying
rent for our land so much a foot per year. There
are several families over there that have children,
and it is a difficult thing for those children to
get back and forth to go to school, a positively
dangerous thing in bad winters.

Q. What happens over there when there is a 507
fire? A. When we have a fire over there usual-
ly the buildings burn down. It is very difficult
matter to get the hose across now since these
high walls have been put up there.

Q. What do they do about the hose? A.
Since the lock was built?

Q. Yes. A. I think they take it across the
harbor.

Q. Do you know? A. I don't know; I wasn't 508
there the time the last fire occurred.

Q. It is all in the City of Buffalo, right oppo-
site the busy part of the city? A. Yes, the
island is in the City of Buffalo.

Q. These boathouses, many of them are owned
by clubs, are they not? A. Yes, sir. The
Launch Club owns a boathouse just north of the
International bridge, on the east side of the is-

R. W. Lytle, for Pltf., Cross.

509 land, the Pastime and the Welcome Club, the Home Club, the Batcheller and the Bison City, and there are some others that I can't recall.

Q. These clubs have quite a considerable number of members, have they not? A. Yes, they have a membership of from 4 to 16 or 18 or 20. The Bison Club I think has a membership of about 16 or 18 men.

510 Q. What kinds of boats have they, are some of them valuable boats or just ordinary skiffs? A. I only know from the general appearance of them, and what is said. Mr. Hager had a fine yacht there about 35 or 40 feet long; he said it cost him \$3500 or more, and it looks it. Mr. Gunnell has a fine boat there.

Q. Mr. Gunnell is a public accountant, is he not, and a man of prominence in the town? A. I
511 don't know whether it is that Gunnell or not.

Q. A number of highly respectable people have places over there and enjoy the facilities which that island affords? A. Yes, Attorney Wilson has a boat on the east side of the island above the bridge that cost about five or six hundred dollars. Mine cost me \$500, and there are
512 75 or 100 better boats than mine and must have cost that much or more.

Q. The sport of motor boating is very largely developed in Buffalo, is it not? A. Yes, it is.

Q. There are a very large number of motor boats there? A. Yes, sir.

CROSS EXAMINATION by Mr. Moot:

Q. You are a lawyer with an office downtown, where most lawyers' offices are to be found,

R. W. Lytle, for Pltf., Cross.

near the City Hall? A. Yes, on the corner of 513
Huron and Franklin.

Q. That is near the City Hall? A. Yes.

Q. That is about how many miles southeasterly from the location you are speaking of, Squaw island? A. Do you mean the location of the bridge?

Q. From the center of Buffalo, where the City Hall is, and where the lawyers' offices are? A. 514
I should say about three miles or three miles and a half.

Q. You think Squaw island is about three or three and a half miles from the center of the city? A. I say from the City Hall, I should say by the Niagara street line about three miles or three miles and a half.

Q. There are no streets on Squaw island? 515
A. No, sir.

Q. No roadways? A. No, sir.

Q. And never have been any to your knowledge? A. There was a roadway one time that went across the island to a ferry that plied between Squaw island and Bridgeburg, but that has been abandoned for the last 25 or 30 years, I guess.

Q. You remember as a boy there was such a 516
thing as a roadway then that made the connecting link between the ferry that went from the west side of the island to Canada? A. Yes.

Q. And from the east side of the island to Buffalo? A. I don't remember ever seeing that ferry, but there was a roadway that was there for that purpose.

R. W. Lytle, for Pltf., Re-direct.

517 Q. As the connecting link between those ferries? A. Yes.

Q. Of course a great many people have gone back and forth between Buffalo and the island that have used row boats? A. Yes, sir.

Q. That has been a common method of going back and forth between the island and Buffalo ever since you can remember? A. Yes; we use our row boats to get water.

518 Q. And usually one or more energetic boys or young men are there with row boats to row you across if you are willing to pay them a tip for doing it? A. They weren't very abundant when we wanted them.

Q. There is usually somebody there with a boat to take you across? A. Why, in the last four or five years it has been a difficult matter to get across. This wall nine feet high makes it a difficult matter to get over the wall into a boat. That is where the trouble is.

Q. That wall was put there by the government making this Black Rock improvement? A. Yes, sir.

Q. These changes that the government made in making this Black Rock improvement made this a difficult thing, going back and forth between Buffalo and the island? A. Yes, sir, I think that is a fair conclusion.

RE-DIRECT EXAMINATION by Mr. Kellogg:

Q. Could you give any estimate of the number of people that you have seen use that island in a single day? A. Well, the biggest crowd I ever

R. W. Lytle, for Pltf., Re-cross.

saw was the time they had a right good baseball 521
game there between the Travelers of Southeast
Buffalo and the Black Rivers of North Buffalo.
They are two good clubs and they played a game
there and I should judge there were 800 to 1000
people there. The next biggest crowd, I saw
there was the time when the Bison Club had a
fair there and they had games; they had a greased
pig and a few other entertainments and a lunch, 522
a wrestling match, running races, and one thing
and another; I should say there was a crowd there
that day of 1000 or 1200. When the flowers are
in bloom, and there are lots of flowers on the
northern part of the island, it is no uncommon
thing to see men and women and families over
there gathering flowers, maybe 50 to 150 or 200
on Saturdays and Sundays.

Q. There have been considerable gatherings 523
of people there right along during the summer
months on the island? A. Yes; they used it
very much as a park through the warm weather,
that is, before this wall was built, before the lock
was taken out, when we had access.

Q. You mean that stopping the access the
number of people and number of boathouses and
everything else is very much less than it used to 524
be? A. It broke up all the ball games and pret-
ty much all the other patronage.

RE-CROSS EXAMINATION by Mr. Moot:

Q. That is, this government improvement, of
putting this wall over there, so they couldn't get
there any more, it stopped their going there? A.
By putting the wall in there and dredging out the
lock.

R. A. Kellogg, for Pltf., Direct.

525

Mr. Ivins: The map showing the proposed development on Squaw island and the actual street layout of the land opposite on the Buffalo City side is offered in evidence by consent.

Received and marked "Plaintiff's Exhibit C."

526

Mr. Ivins: I offer in evidence this large map that Mr. Ricker referred to when being examined.

Received and marked "Plaintiff's Exhibit D"

Wednesday, June 21, 1916, 10 a. m.

527 RALPH A. KELLOGG, sworn for plaintiff,
testified as follows:

528 I reside in the City of Buffalo and have practiced law there and been interested in various business projects for some 25 years. About 10 years ago I was employed by Mr. Bickford of Evarts, Choate & Sherman of New York, one of the 11 trustees who owned the entire stock of the Niagara River Hydraulic Company, which was a corporation that had owned Squaw island in the Niagara river for many years. I was to take charge of the island, keep squatters off of it, and negotiate for its sale in whole or in part. From that time to the present time I have been closely and intimately connected with that property, having interested in it a friend and client of mine.

R. A. Kellogg, for Pltff., Direct.

Mr. Daniel E. Knowlton, the owner of the Knowlton Warehouse Company, and president and chief owner of the Buffalo Cold Storage Company, and therefore a terminal man of wide experience; he and I and three friends obtained an option, a contract, for the purchase of Squaw island. That was some five years ago. We then employed Mr. Ricker to make a plan for a terminal, like, rail and barge canal terminal on that island, together with sites for manufacturing, on the lines of the Bush terminal in Brooklyn. He made the plan which he testified to yesterday, and also prepared specifications and estimates of the cost of that complete project, as shown on that plan. Having obtained that and looking into the matter from every standpoint we could, we formed a corporation which was called the Squaw Island Terminal Company, Inc., to take title to that property and develop it along those lines. I have here a certified copy of the certificate of incorporation of that company, and I should like to put that in evidence.

Received and marked "Plaintiff's Exhibit E."

The Witness: During the time that I was acting as the agent for the owners of the island we had discovered that the lands within the harbor line along the river front of Squaw island contained a constantly returning body of valuable concrete sand and gravel and grit, and I leased the exclusive right to take that sand, grit and gravel to a concern that did business in Buffalo, re-

R. A. Kellogg, for Pltf., Direct.

533

ceiving a royalty for the company. I think it was seven cents a cubic yard minimum, 100,000 yards per annum. In connection with the men who owned that company, Mr. Hyman, Mr. Knowlton and I went to Montreal and saw vice president Kelly and Mr. Hayes, who was then in charge of traffic on the International bridge and for the Grand Trunk railroad, and showed them our plans for the terminal as made by Mr. Ricker, and told them our purposes, and then explained that we wished a switch and road connection with the island so that we might handle from the island this sand and grit and gravel. They promised to—

534

535

Mr. Moot (Int'g): I submit that the negotiations between your company and these companies in Montreal, in view of every ethic of law, would be excluded here. That you had negotiations I think is quite competent, but as to the details to those negotiations I suppose they are not competent, I assume you gentlemen talked with great freedom, without any expectation on either side that it would be regarded as testimony in a court of justice.

536

Mr. Ivins: It seems to me in so far as any statements made by the defendant company can be considered as admissions in this action they are admissible here.

The Witness: If I may, as a witness, state so far as that transaction is concern-

R. A. Kellogg, for Pltf., Direct.

ed I don't think it is necessary to go any 537.
further. We made that demand of them
for a railroad connection.

Q. (Mr. Moot): Just give the date of that,
or about the date? A. That was several years
ago, I think it was either in December, 1912,
or January, 1913; I am not accurate at all about
it.

Q. (Mr. Moot): That is near enough. A. 538
This sand and gravel business as then and now
conducted in Buffalo involves the pumping of the
gravel from the river and its transportation in
a boat to a point on the mainland at which there
is a switch and car service can be obtained. The
plan which we then had and now have was to
run a slip into the north end of the island, build
a washery at that point, use dump bottom scows
which could make instead of one trip a day three 539
per boat, and with rail connection and road con-
nection the cost of recovering and delivering that
material would be enormously reduced. Squaw
island furnished the only place in Buffalo at which
the gravel, sand and grit might possibly have
railroad transportation facilities. Thereafter
we made a number of efforts and had numerous
negotiations with people, large concerns who were 540
coming to Buffalo or wanted to, with reference
to terminal facilities on this island. We could
not seem to break the circle. The railroad want-
ed traffic first, the manufacturers who were in-
terested in going on the island wanted railway fa-
cilities and a roadway first, and the bond people
wanted both first, and for three or four years we

R. A. Kellogg, for Pltf., Direct.

541 went on with these negotiations in that way, passing around and around in a circle. Finally we determined that there was one traffic which we could control and own and that was the sand and grit and gravel business, so we bought the island in the name of the Squaw Island Development Corporation. The other corporation which we had formed could not issue any stock or give any
542 bonds and mortgages until the approval of the Public Service Commission was obtained, being a Public Service Corporation. I have here the deed from the Niagara River Hydraulic Company to the Squaw Island Development Corporation; I should like to put that in evidence.

Received and marked "Plaintiff's Exhibit F."

543 Q. (Mr. Moot): What is the date of the deed? A. The date of the deed is February 1st, 1915.

Q. (Mr. Moot): And it is recorded when? A. Recorded in Erie County Clerk's office in Liber 1316 of Deeds, at page 123, February 6, 1915. That corporation gave back a purchase money mortgage, which I have a copy of here if you want to see it, Mr. Moot. It secures the pay-
544 ment of \$500,000 in bonds at the expiration of 25 years, with five per cent. interest in the meantime, and gives the right to release certain portions of the island on certain payments, and also the rights under certain conditions to excavate the sand, grit and gravel. We had the island bored under my direct supervision; I think we bored 21 holes, and found that it was composed,

R. A. Kellogg, for Plf., Direct.

with a small exception in the middle, of the finest grade of sand, grit and gravel of commercial material to a depth of about from 40 to 50 feet. A rough calculation of the contents of the island as near as we could reach it is that the commercial gravel contents of that island are between four and six million yards; a minimum of four and a maximum of six. We also determined, by the fact that it has been taken out for many years from lands under water within the harbor line of Squaw island, that the annual accretion ran about 100,000 yards, and perhaps a good deal more. 545 546

Q. (Mr. Moot): How many tons is that?

A. You can add 50 per cent.

Q. (Mr. Moot): That would be 50,000 tons a year accretion? A. No, 150,000 tons. 547

Q. (Mr. Moot): 200,000 tons? A. I said the accretions we knew were 100,000 yards a year, and 100,000 yards is 150,000 tons; that is, each yard weighs about 3000 pounds. Having no rail or road connection on the island we leased, the Squaw Island Development Company did, a piece of land on the mainland at Ferry street, and secured a small plant, and in the season of 1915, beginning in June and going around to the following May, we took out, handled and sold our entire capacity, which was some 66,000 yards, or about 100,000 tons. This spring we have organized, for certain reasons that possibly exist, a separate corporation called the Squaw Island Sand and Gravel Corporation, of which I have here the certificate of incorporation, and would 548

R. A. Kellogg, for Pltf., Direct.

549 like to put that in evidence to complete this list.

Received and marked "Plaintiff's Exhibit G."

550 The Witness: The Squaw Island Development Corporation then made, on the 1st day of February, 1916, an instrument which I have here, whereby it grants to the Squaw Island Sand and Gravel Corporation exclusive rights to take sand, grit and gravel from Squaw island within the provisions of the mortgage and from
551 lands under water within the harbor line, and also a lease of the north 10 acres of Squaw island for a plant; also a right of way to connect with the International bridge or railroad, a roadway, and for that the Squaw Island Sand and Gravel corporation agrees to pay the taxes on the island and an amount equivalent to the interest on the purchase money mortgage, \$25,000 per annum. There are various other provisions in the instrument, which you might like to see, Mr. Moot.

552 Q. (Mr. Moot): Is there anything there that is questionable; we won't stop to examine it; there isn't anything there that is questionable, is there? A. No; at all. It is simply as I say a grant of all this gravel business, our plant and everything else to this company, with a place on the island to do business and their agreement to do business. I would like to put that in evidence.

Received and marked "Plaintiff's Exhibit H."

R. A. Kellogg, for Pltf., Direct.

Mr. Moot: Of course I assume a good 553
deal of this perhaps isn't competent, but
as this is a case in equity before your Hon-
or without a jury, while I can't keep ob-
jecting I don't want to waive my rights.

The Witness: This sand and gravel 554
corporation issued its securities and ob-
tained from the stockholders \$150,000 with
which to do this business, on top of all the
plant which we already had, and it now
has all or the most of that money in bank
awaiting the building of these plans. The
equipment which this company has already
bought in the way of a boat, trains, etc.,
has a capacity for the current year, operat-
ing on the mainland on our leased yard, of
approximately 125,000 yards; it is produc- 555
ing at that rate every day.

Q. (Mr. Moot): That is cubic yards? A.
Cubic yards. Add 50 per cent and you get the
tons. That company has obtained plans com-
plete for its dock, for its slip and washery on
the island from competent engineers and have
had expensive efforts to find the best methods,
and is also waiting to go on with that project
under the most advantageous circumstances on 556
the island; it is waiting for a rail and road con-
nection with the International bridge. The
plant as planned will have a capacity of about
300,000 yards per annum. In January of 1915,
Mr. Knowlton and I had another conference, rep-
resenting the company about to be formed to take
over this island, with Vice President Kelly, Vice

P. A. Kellogg, for Pltf., Direct.

557 President Dalrymple, and Mr. Safford, chief engineer of the Grand Trunk and of the International Bridge Company, with reference to the building of this roadway and switch. At that time those gentlemen—do you object to this, Mr. Moot?

Q. (Mr. Moot): Mr. Kellogg, you say that was in January? A. January, 1915.

558 Mr. Moot: I understood you to say 1916.

The Witness: No, 1915, just a short time before this bill was presented to the legislature, as I remember it.

559 Mr. Moot: Even then I don't see how the details of the negotiations between these parties for a roadway and switch which preceded the passage of this law can furnish any foundation for a penalty, as it is admitted in the opening that it resulted in no agreement, and if it did the agreement itself would be the only competent evidence, if that would be competent, for the foundation of a penalty. I think I ought to raise this point.

560 The Court: Objection sustained I don't think we ought to take that up. I think that one statement that they have had several negotiations from that time to this will be all that is necessary.

The Witness: There is one other point, your Honor, and that is this, I don't know whether it is competent or not. We made an offer to these gentlemen to build this

R. A. Kellogg, for Plt., Direct.

bridge and to guarantee the tolls. Those 561
are the points that I wanted to bring out at
that time.

Mr. Moot: Of course that would ne-
cessitate going into all the details to see
whether it was a reasonable offer or not.
As a common carrier, and of course the
bridge is a common carrier of cars and
not a traffic in the ordinary sense, the 562
common carrier obligation would only be
to carry traffic in vehicles and passengers
at the most. That is the most that could
be claimed in the broadest conception of
the franchise. I don't see how the de-
tails of the negotiations can be competent
as a basis for the recovery of a penalty.

Mr. Kellogg: My point in the matter 563
is simply this, your Honor, the impression
that was left here, that we the owners of
Squaw Island, are trying to make this
Grand Trunk Railroad go to an expense
without any recourse. We have proposed
in writing and orally, I have done it my-
self for this company, to either build such
a roadway as we wanted at our expense, or
to guarantee what these gentlemen say will 564
be the cost of maintenance and interest at
six per cent, etc.

After further discussion Mr. Kellogg
said:

I would like, if I might, to ask myself
that one question and have it objected to
and passed upon. I will ask myself this
question:

R. A. Kellogg, for Pltf., Direct.

565 Q. Did you in January or the early part of
February, 1915, go with Mr. Knowlton to Mon-
treal and there meet Mr. Kelly, the vice presi-
dent of the International Bridge Company, and
also vice president of the Grand Trunk Railway,
and Mr. Dalrymple, vice president of the Grand
Trunk Railway in charge of traffic, and Mr. Saf-
ford, chief engineer of the International Bridge
566 Company and of the Grand Trunk Railway, and
offer to those gentlemen to pay the cost of the
roadway on the Black Rock harbor span and ap-
proaches thereto sufficient for the purposes of the
owners of Squaw Island?

Mr. Moot: I don't object to the form
of the question, your Honor. That might
be objectionable, but I object to the sub-
stance broadly on the ground that it is in-
567 competent and improper here, because
whatever the negotiations and whatever
the offer that preceded the legislation that
resulted in the act which is the basis of
this action for a penalty, this action for a
penalty must rest on whether or not we
have violated the act by acting or omitting
to act contrary to it. We cannot be held
568 down by any offer made by these negotiat-
ing parties before the legislature passed
the act.

Objection sustained. Plaintiff excepted.

Q. Have you since that time and in or about
the month of April, 1916, repeated that offer and
also offered to guarantee in any form required
by the railroad that the tolls upon said roadway

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should equal six per cent on the investment, the 569
maintenance charge and the expense of operat-
ing toll gates, etc.?

Mr. Moot: Again I waive my objection
to the form of the question, and object to
the substance on the same grounds as be-
fore, and upon the additional ground that
the summons in this action bears date Jan-
uary 11, 1916, and this action was in fact 570
commenced by the service of that sum-
mons and complaint January 13, 1916,
consequently the action was ripe at that
time, and what was since done by these
parties in negotiations with each other
would neither make a cause of action on
one side nor a defense on the other.

Objection sustained. Plaintiff excepted.

The Witness: There are no squatters 571
on Squaw Island and have been none for
seven years. Every person on the land
formerly owned by the Niagara Hydraulic
Company, and now owned by the Squaw
Island Development Corporation, is there
under a written lease, paying rent to the
company. I personally know those facts
to be true, having had charge of the mat- 572
ter.

By Mr. Ivins:

Q. Have you made any estimate of the prob-
able number of cubic yards of sand and gravel
that will be moved across the Black Rock draw
by the sand and gravel company if the highway

R. A. Kellogg, for Pltf., Cross.

573 arm is constructed and switching connection to the railroad made? A. I think I have covered that point, Mr. Ivins. Before you came in I think I covered that whole point.

Q. Yesterday Mr. Safford testified with regard to stating to you an estimate of the cost of carrying, I mean overhead charges and operation charges, this proposed highway arm, but he couldn't remember very clearly what his estimate
574 to you had been; do you remember that? A. Yes.

Q. Will you state it? A. \$3300 per annum.

CROSS EXAMINATION by Mr. Moot:

Q. Do you remember what items were included in that \$3300? A. The item of interest on the cost of building the approach from Niagara street
575 and the arm of the bridge itself, and the roadway on the International Bridge Company's lands on the Squaw Island side; the annual maintenance cost and the wages of two men, a night and a day man, to act as toll keepers, as I remember it.

Q. Was there any talk about what those two men would cost, what their salary would be for 12 hour shifts? A. As I remember it in detail,
576 Mr. Moot—

Q. (Int'g). No, just that. A. I think so, yes. My memory is stronger as to the total rather than in detail.

Q. What was the daily or monthly wage of each of those men to be? A. I think it was \$50 a month, I think \$1200 a year was the amount

R. A. Kellogg, for Pltf., Cross.

allowed for those two men. That is my memory 577
of it.

Q. It wasn't \$60 a month? A. I think it was
\$1200 per annum.

Q. You know very well you couldn't get them
for that these days, or even last December, don't
you? A. No.

Q. Don't you know that farmers are paying
from two to three dollars a day, and ordinary 578
highway workers get from \$2.50 to \$3 a day, and
that the Lackawanna Steel Company is short
from 500 to 1000 men all the time, although they
hire 1500 new men a month, because the men drop
out and all that, and that they pay from \$7 to \$9
a day for their expert men and they pay \$2.75 for
the most ordinary laborer; don't you know facts
of that character? A. Yes, I know that men 579
are paid such figures by the day. I know that
men can be hired for very much less by the
month.

Q. Men to do daily work and operate 12 hours
a day and board themselves and find their own
dwellings and all that, \$60 a month would be a
very reasonable allowance for such men, even last
December or October, wouldn't it? A. A. I 580
said, Mr. Moot, I cannot definitely state whether
it was \$50 a month or \$60; it was around that
sum.

Q. Well, that would bring the two men, if it
is two men, anywhere from \$2400 a year up to
nearly \$3000 a year alone for maintenance? A.
I don't see it that way, Mr. Moot. \$60 a month
is \$720 a year.

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581 Q. You are right, from \$1200 to \$1500? A.
From \$1200 to \$1440.

Q. Was anything said about the cost of the
land under these approaches or the interest on
the cost of the land? A. There was not.

Q. Was anything said about the cost of the
steel for these approaches or the interest on the
cost of the steel? A. Certainly, yes, for all
work done, not anything for the property.

582 Q. Not anything for the property? A. No.

The Court: Was there any item of
lighting the driveway at night?

Q. Was there any item for lighting the drive-
way? A. I don't think so, I don't remember
any such item.

Q. There was talk that there would have to
be men there so as to keep it open all the time if
583 a roadway was put on there? A. Not by us,
but by the Grand Trunk officials, yes.

Q. And you recognized there would have to
be lights if it was kept open nights? A. I should
think that would be necessary.

Q. Of course you have made no estimate of
what the lighting would cost? A. I have made
no estimate at all.

584 Q. Was there any talk or any figures about
what the depreciation and the percentage of de-
preciation a year would be for the steel and for
the flooring and all that? A. As I remember
those items were both figured by the officials. I
didn't make the figures. They simply submitted
them.

Q. Was there anything said about what the

R. A. Kellogg, for Plff., Cross.

taxes would be? A. No, not that I remember. 585

Q. If the land on one side cost \$26,000 and on the other side \$13,000 and you were to figure the interest on those items alone it would make a big addition to this cost of handling the thing, would it not? A. The interest on \$26,000 would be a considerable sum, yes.

Q. Or even on \$13,000? A. Yes.

Q. Were any items of that sort mentioned? 586
A. Not mentioned in any way.

Q. Was anything said about painting or the annual charge for painting? A. Why, I assumed that that was in their items of maintenance, I don't know.

Q. Do you remember whether anything was said about it or not? A. No; they didn't go into those details with me at all.

Q. So it is rather by way of inference rather 587
than by express statements that you infer that their estimate covered everything? A. Well, they made the statement to me as to what the total would be, and I have given that total; that is all.

Q. Whether that total covered everything or just covered figures that they would be willing to contract with you or you didn't quite ascertain? 588
A. No, I did not ask them what the particular detail of these figures was beyond a mere casual conversation on the subject.

Q. Now this matter of squatters; all the people on the island then for the last seven years have been tenants of your company? A. I said all the people on the lands that we own. There are some lands along the island owned by the

R. A. Kellogg, for Pltf., Cross.

589 United States Government, and there may be some squatters on there; I don't know whether they pay anything or not.

Q. Leave out what the United States Government has and you say there are no squatters on that which you own and you have 124 acres? A. We have about 100 acres of upland and 24 acres of land under water within the harbor.

590 Q. That is substantially what there is of the island, isn't it, that plant that you own; the government hasn't very much? A. No; it has a strip about 75 feet wide, running from the International bridge to the south end of the island. It also has a strip on the north side about 1000 feet long I think.

Q. On the Black Rock harbor side? A. Yes.

591 Q. There certainly aren't very many dwellings on that strip, if there are any? A. A few.

Q. By a few you don't mean more than a dozen or two, do you, Mr. Kellogg? A. No, I shouldn't say so.

Q. So that in substance all the people on that island in any form for the last seven years have been tenants of the owner? A. Well, all the people that have structures there, yes.

592 Q. All that have business there as far as you know? A. Well, I think that a good many people have gone to the island to fish, to swim, to play ball and all that, that we don't pay any attention to, but I am talking about the people who have actually definite possession of ground covered by some kind of a structure.

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Q. I suppose you will agree with Mr. Lytle 593
that as far as your observation has gone since
the government made the improvement and built
this wall between the harbor and the river that
that has interfered with this flow of people to
the island for baseball and such purposes? A.
It has; it has also interfered with a number of
our tenants.

Q. Kept them down? A. Very much. 594

Q. How much? A. Oh, I can only tell you
in the amount of rental obtained. I think we
had obtained as high as \$1400 a year in rentals,
and I think this last year it dropped down to six
or seven hundred dollars; it cut it in two; in the
middle.

Q. Those people that go to the island go there 595
in the open season, spring, summer and fall, be-
fore cold weather has put its disapproval on fes-
tivities of that sort? A. All but a few of them
who live there the year around.

Q. There are not more than a half dozen live
there the year around, are there, Mr. Kellogg?
A. No.

Q. They get back and forth some way, as they
always have, either on the ice or by boats or in
some way? A. There is this exception, that 596
the men that own boats do go over there all win-
ter to fix up their boats, and all through the win-
ter season there are more or less people over there
doing that kind of work on these boats; that is
all.

Q. But in the winter season, except something
of that sort, there isn't much passage to and from

R. A. Kellogg, for Pltf., Cross.

597 the island except by the people who actually live there, is there? A. Not now.

Q. And that is usually over the ice in the winter, and of course they can go over the ice there as freely as they could with a rowboat? A. The period of time in which Black Rock harbor is frozen over sufficient to carry foot passengers is very short.

598 Q. It is very short, from about Christmas time to about the 1st of April or the latter part of March? A. No, I don't think Black Rock harbor often freezes over solid enough for that purpose before the middle or the end of January; it is only a couple of months.

Q. You wouldn't claim that this bridge should be built for the accommodation of these tenants or the owner, would you? A. Well, that is a question..

599 Q. You couldn't figure it in any way? A. I shouldn't ask it, Mr. Moot.

Q. You wouldn't claim it? A. I wouldn't ask it, no; whether it should be done or not I am not willing to say.

Q. Your claim is that it should be built under this statute for this commercial development that you have pictured as possible or probable if one is built? A. No, I claim it should be built for a perfectly definite business that is now going on.

600 Q. I put my question in the negative form rather than the affirmative; I don't ask you what you do claim, I ask you if you would claim a certain thing? A. I claim a certain thing, and in addition the other thing.

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Q. No, I am asking you now specifically 601
whether you would claim it should be built for
this commercial development which you have
pictured as impossible or quite probable? A. If
you include that, Mr. Moot, the existing sand
and gravel business, which isn't merely possible
but is ready, I agree with you.

Q. Now that sand and gravel business has
been conducted by the same people who have in- 602
corporated this company for a great many years
in some form, more or less, has it not? A. No,
sir.

Q. Haven't Mr. Hyman and his associates
been interested in this gravel company? A. Not
the slightest.

Q. They haven't any interest in that? A.
None, whatever.

Q. Haven't any of the parties in this gravel 603
company had any interest in the gravel business
before; haven't they been conducting the gravel
business before? A. Never to my knowledge; I
will give you the names and you can see for your-
self.

Q. I don't care about that; you say not and
I will take your word for it? A. Not that I
know of. 604

Q. You know that the sand and gravel busi-
ness has been conducted on this river by sand
suckers, as they call them, for a great many
years? A. Yes.

Q. Various people have been competing for a
share in that business? A. Yes.

Q. It has been conducted by vessels going out
and sucking the sand up and bringing it into

R. A. Kellogg, for Pltf., Cross.

605 wharfs, discharging it and from which point it has been carried by trucks to various parts of the city or loaded on cars and drawn away as far as reasonable to carry it? A. Yes.

Q. Now, this company that you represent, that is conducting this business, they have rented a yard in Tonawanda from which they discharge loads from the vessels to be shipped by rail to
606 various convenient points that are required? A. We have just rented such a yard; we haven't rented it but it has been rented by a corporation in which we own a half interest.

Q. So that its business is being conducted by some arrangement or other with your company that owns the sand and gravel? A. Yes; we also have a yard at Ferry street of our own, on the New York Central tracks.

607 Q. If this other development that you urge through the addition of an arm of the bridge could be made then the company would get whatever revenue it is entitled to under the statute for the loads that would pass over this arm of the bridge in the conduct of its business? A. Whatever it is entitled to by law; I don't know whether it is limited by the present statute or not.

608 Q. Have you made or had made any estimate of the cost of this arm of the bridge, and have you made or had made any estimate of the return from that addition to the bridge on any probable traffic there would be over that addition to the bridge? A. Why, I have made such an estimate. I can make it now. I have made this, Mr. Moot. I had two contracting engineers

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make an estimate some time in May, 1915, I think 609
it was, of the cost price which they would take
the contract for to build such a roadway as was
required to do the service on Squaw island.

Q. That is, you had two engineers in May,
1915, make an estimate of what they would make
this addition, this required addition to this bridge
for? A. Yes. I also have made myself nu-
merous estimates of what the traffic which we 610
propose for this bridge would be.

Q. Have you any of those detailed estimates
here, Mr. Kellogg? A. I can give them to you
in a moment. It is perfectly simple.

Q. I don't choose to spend any time on it, but
if you had them where I could expose them to the
light first I would determine whether I would
put them on the record or not. A. What I re-
fer to, Mr. Moot, is this: Take the sand and 611
gravel business by itself—

Q. (Int'g). I don't choose to ask that ques-
tion, Mr. Kellogg. If you have the specific es-
timates in black and white so that I can look at
them I would like them? A. I haven't them in
black and white, but I have them in my mind.

Q. Well, that is just where I will leave them.
A. All right. 612

RE-DIRECT EXAMINATION by Mr. Ivins:

Q. I would like to get these detail statement
on the record.

Mr. Moot: I respectfully submit that I
don't think Mr. Kellogg claims to be an
expert on the subject, and furthermore we

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613 have got to have something more definite
than that on which to attack or defend the
statute.

A. It is a mere matter of calculation from the
facts already in evidence.

614 Q. Mr. Kellogg, will you state the estimates
that you made of the traffic which will be availa-
ble across the proposed extension of the Black
Rock harbor draw or the proposed arm, based on
the actual business ready to proceed in the sand
and gravel business?

615 Mr. Moot: To save my point, I object
on the ground that it appears that when
this law was passed, or took effect, and
this action was brought on January 13,
1916, by the service of a summons and com-
plaint, there was no organized sand and
gravel business whatever, and the subse-
quent organization of this sand and gravel
company and the development of this sand
and gravel business not then being in ex-
istence, it being purely problematical, we
cannot be fined and made to pay penalties
because we could not foresee what these
gentlemen might do in the future in de-
616 veloping a business that didn't exist when
the statute took effect.

The Court: I understood this witness to
say that none of these men were interested
in whatever business there was there at
that time.

The Witness: This company bought the
island on February 1st, 1915, having had

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an option on it for four or five years before 617
that. It immediately started to acquire
the necessary plant and facilities; it did
not actually dig any gravel or sell any until
the month of June, 1916.

Q. (The Court). That is this month? A.
1915, I beg your pardon. This all happened in
1915, last year. The title was taken in 1915, a
year ago.

618

By Mr. Moot:

Q. Then you are now correcting as to date
the statement that you made before, is that it?

A. I simply say that we bought the island Feb-
ruary 1st, 1915, and we actually began to exca-
vate the sand, grit and gravel the first week in
June, 1915. That is simply to get those dates cor-
rect, that is all.

619

Q. I understood you to give those dates be-
fore, Mr. Kellogg, as 1916? A. That was an
error, Mr. Moot. The deed here shows that it
was in 1915.

Q. While the incorporation of your sand and
gravel company was in February, 1916? A.
Yes. The developing corporation I testified took
~~out 66,000 yards before this sand and gravel cor-~~ 620
poration was organized at all.

Q. Perhaps you said that but I didn't get it
if you did. A. I did.

(Last question asked by Mr. Ivins was
repeated as follows):

"Q. Mr. Kellogg, will you state the estimates
that you made of the traffic which will be avail-

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621 able across the proposed extension of the Black Rock harbor draw or the proposed arm based on the actual business ready to proceed in the sand and gravel business?"

By the Court:

Q. Why don't you confine yourself to what was available in traffic from sand, gravel and grit transportation on a highway arm of that bridge if in existence on the 1st day of January, 1916? A. If all available you mean, the business in actual existence? There was at that time a business of 66,000 yards per annum.

Q. That is about 100,000 tons, as I understood you to say? A. Yes.

Q. That was available on the 1st day of January, 1916? A. Yes; the business was going along at that rate at that time.

Q. And that is the amount which if the arm had been in existence would have been transported over that arm? A. I think it would have been much more than that.

Q. It would have been that amount at least? A. Yes, because we had handled that amount otherwise.

624

By Mr. Ivins:

Q. Can you tell me the market price on the 1st of January, 1916, for sand and gravel in the City of Buffalo? A. The schedule price, that is the price which everybody names, is 80 cents a yard for sand and 85 cents for grit and gravel F. O. B. car or truck. Now in the competition of the

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business that amount, on large orders, is very 625
often reduced. I have known it to be as low in
the last two years as a net of 67 cents on track
or truck.

Q. Now, will you tell me what is the cost of
digging and washing, if necessary, and the plac-
ing on trucks on Squaw island?

The Court: What difference does it make
how much it cost this company to wash this 626
gravel?

Mr. Ivins: If there is a larger margin of
profit in this, your Honor, the business is
likely to grow. I will withdraw the ques-
tion.

Q. Can you state roughly the average annual
sales of gravel and sand in Buffalo; what is the
demand? A. Not from my own personal knowl- 627
edge exactly.

Q. Are you familiar with the present opera-
tion of the International bridge; do you know
whether at present watchmen are employed by
the company at the ends of the bridge to keep
trespassers off? A. Yes, I know that from per-
sonal experience with them.

Q. The company maintains watchmen at the
Black Rock end, the Buffalo end of the Interna- 628
tional bridge? A. At both the Buffalo and the
Squaw island end; at least there are men there
who prevent people from going on that bridge.

Mr. Kellogg: I should like to say that
because of the fact that the Squaw Island
Freight Terminal Company, Inc., has not
actually done any business within the two

A. J. Dillenbeck, for Pltf., Direct.

629 years since it was organized, we have recently organized a new company in that same name to take over that business, and the option which that company always has had to take over this island property, and I have here a deed from the Squaw Island Development Corporation to the Squaw Island Freight Terminal Company, Inc., of that island subject to the lease to the sand and gravel company.

630

Q. (Mr. Moot). What is the date of that?

A. It is dated yesterday.

Q. (Mr. Moot). Dated June 20? A. June 20, 1916.

Mr. Moot: I think I will have to object to that.

Objection sustained.

631

Mr. Kellogg: Exception.

ARVIN J. DILLENBECK, sworn for plaintiff, testified:

Examined by Mr. Kellogg:

632

Q. Mr. Dillenbeck, you reside in Buffalo? A. I do.

Q. You are mechanical and civil engineer?

A. A civil engineer.

Q. And have been for some years? A. Yes, sir.

Q. What was your training, briefly? A. I

A. J. Dillenbeck, for Pltf., Direct.

have had about 12 years' practical experience and 633
a technical training at Cornell University.

Q. (The Court) what has been your experi-
ence; can't you go on and tell us; have you built
railroads or mills; what have you done; go on
and tell us? A. For four years I was on rail-
road construction mostly in New York State at
various points, covering location and construc-
tion of railroad work. For two years I was with 634
the Cambria Steel Company of Pennsylvania, as
assistant engineer in the mining department.
This department had charge of ore deposits, coke
ovens, mines, limestone quarries and had charge
of all matters pertaining thereto, bridges, water-
works, the building of ovens and buildings. Since
1913 I have been with Lupfer & Rennick of Buf-
falo. They are consulting and contracting en-
gineers; the majority of their work since I have 635
been with them has been either power house or
bridge construction.

Q. In the spring of 1915 did you personally
make an examination of the draw across Black
Rock harbor with reference to hanging thereon
a roadway and building approaches to that road-
way on the New York side and on the Squaw
island side? A. Yes. 636

Q. And did you make an estimate of the cost
of such work as would provide such a roadway
usable by wagons and persons and motor trucks?
A. Yes, I did.

Q. What in your opinion would have been the
cost of doing that work in May, 1915, at the time
you made the estimate?

A. J. Dillenbeck, for Pltf., Direct.

637 Mr. Moot: I object to that. The question should be December, 1915, because that was the time, from the time this law took effect, which was May 22, 1915, to the end of December, that we had to comply with the law, and it appears there was a great change in the price during that period of time in the cost of such work.

638 The Court: We will take this statement and then modify it by the increased cost of steel and other materials, if there was any increase. The witness on the other side said there was some increase in the fall of that year, 1915.

 Mr. Kellogg: Mr. Dillenbeck will testify to that same effect, very largely.

639 Q. (The Court) The question is, how much, according to your estimate, would it then cost?

A. About \$10,400.

Q. The cost of steel since that time has increased, has it not? A. Since that time?

Q. Yes. A. Yes.

Q. When did the increase begin to occur? A. The increase first was in July.

640 By the Court:

Q. What we want is the percentage of increase, the difference between that time and December 31st; now can you tell us? A. December 31, 1915?

Q. Yes, what percentage of increase on the whole structure would you have to take into consideration?

Mr. Kellogg: You may as well put it, if

A. J. Dillenbeck, for Pltf., Cross.

you will, on the whole structure, not merely 641
the steel but the whole thing; how much
more would it cost to build this thing in
December, 1915?

A. Not more than 25 per cent.

Q. (The Court) Add 25 per cent to \$10,400, is
that right? A. That is right.

CROSS EXAMINATION by Mr. Moot: 642

Q. Have you got the details of your estimate?

A. I have.

Q. Give them to the stenographer. A. Steel,
\$6276; wood block and creosote plank pavement.
\$2755; creosote sidewalk, \$313; extra heavy rail-
ing, \$870; grading for approaches \$200. That is
all.

Q. (The Court) total? A. \$10,414.

Q. How many tons of steel? A. Approxi- 643
mately 105.

Q. At what price? A. Three cents.

Q. Or \$60 a ton? A. That is right.

Q. That amount of steel allowed for a road-
way how wide? A. A 12 foot roadway and a
four foot sidewalk.

Q. Would a 12 foot roadway be sufficient to
permit two loaded trucks to pass each other? A. 644
I think it would be doubtful on that type of con-
struction.

Q. Why, you know it wouldn't be sufficient to
permit a couple of loaded automobile trucks to
pass each other with their loads, don't you, 12
feet? A. It would permit trucks with a certain
manner of load to pass, empty trucks might pass,
but with certain loads it would not.

A. J. Dillenbeck, for Pltf., Cross.

645 Q. A five or six or seven ton automobile truck, two empty ones couldn't pass each other, could they, on that bridge with the ordinary boxes that they put on overlapping their wheels? A. I think they could.

Q. Aren't they more than six feet wide? A. The bases are not.

646 Q. I am asking you if the ordinary overlapping box of a five or six or seven ton automobile truck is not more than six feet wide? A. I believe it is.

Q. Then they couldn't pass, that type of truck couldn't pass on the bridge, could they? A. Yes, they could..

Q. In spite of the fact that their bodies are more than six feet wide? A. Yes, sir.

647 Q. How could they pass? A. The wheel bases are not five or six feet wide.

Q. How can you get one truck going one way and the other going the other way pass each other on the bridge when their boxes or platforms are more than six feet wide on each of them? A. One side of one truck could extend over on the sidewalk.

648 Q. Well, the ordinary width of a state highway is 16 feet, isn't it? A. I believe it is.

Q. Is there any reason why this bridge shouldn't be 16 feet wide? A. You refer to the roadway?

Q. I do. A. None that I know of.

Q. And really to make a reasonable allowance for accidents and blunders of drivers and all that it ought to be 16 feet wide, hadn't it? A. Yes, sir.

A. J. Dillenbeck, for Pltf., Cross.

Q. Now, what load did you provide for on this 649
bridge? A. 18 ton trucks.

Q. An 18 ton truck with how many or how
few wheels distributing the load? A. Four
wheels.

Q. How far apart? A. 10 feet.

Q. You take a steam roller, how much space
is a steam roller's 18 tons distributed over? A.
I am not prepared to give any definite answer to 650
that.

Q. It isn't 10 feet long, is it? A. I don't
know.

Q. You don't think it is, do you? A. I don't
know.

Q. If it was less than 10 feet long then you
would have to increase the strength of your
bridge, wouldn't you? A. Not with one roller.

Q. How about if there should be a roller go- 651
ing one way and a loaded truck with 10 or 12
tons on it coming the other, then what? A. I
think it wouldn't be necessary.

Q. What wouldn't be necessary? A. To
strengthen the bridge.

Q. You think allowing for 18 tons would be
enough although there was 18 tons going one
way 12 tons coming the other way on the same 652
spot at the same time, passing each other? A.
In designing for an 18 ton truck—

Q. (Int'g) Just answer that (question repeat-
ed). A. In speaking of an 18 ton roller I do.

Q. You do? A. I do.

Q. Do you mean that having allowed for an
18 ton bridge that you could put 12 tons more in

A. J. Dillenbeck, for Pltf., Cross.

653 motion going the other way on the same spot at the same time without doing anything to your bridge? A. I do.

Q. What is your factor of safety that you have allowed for? A. The factor of safety is four.

Q. What is good engineering practice as to the factor of safety in a bridge? A. Four.

Q. At least six, is it not, sir? A. Four.

654 Q. Can you give me any authority, any standard authority that drops as low as four? A. Greiner.

Q. When did Greiner come out? A. That I can't tell you. He has a standard—

Q. (Int'g) Don't you know that the factor of safety is at least six and has been for a great many years in bridges, in good engineering practice to put it at seven and eight, don't you know that? A. No, sir.

Q. You won't swear it isn't so, will you? A. You are asking me to swear that good engineering practice puts the factor of safety at six or seven?

Q. At least six, yes, sir. Can't you answer that? If you can't we will go on. A. Well, I wouldn't care to swear there wasn't, no.

656 Q. Don't you know as far back as 1882 the Court of Appeals of this state condemned the Lake Shore Railroad for having a factor of safety of less than six in the Ashtabula bridge built long before that, because the bridge went down, in an action where the brakeman brought the action and the company was held responsible? A. No, I have no such knowledge.

A. J. Dillenbeck, for Pltf., Cross.

Q. Don't you know that all courts from that 657
time have held that bridges must have, as a mat-
ter of law, a factor of safety of at least six to
pass the muster of the law and get the case
where it wouldn't present a question of fact for
a jury as to negligence in not furnishing a suffi-
cient factor of safety? A. No.

Q. You never heard of that before? A. No.

Q. You didn't know there was an Ashtabula 658
bridge case in the Court of Appeals in 1882 until
I put it to you? A. No.

Q. Then you are not posted on this question,
are you? A. I am not posted on the question
of the law, no.

Q. You are not posted on the question of the
factor of safety that the law passes, are you? A.
I am; I know what is good practice.

Q. Who is your authority, anybody except 659
Greiner? A. Good practice.

Q. I say is your authority anybody except
Greiner? A. Yes, I can give you another
authority?

Q. Who? A. Prof. Jacobi of Cornell Uni-
versity.

Q. You say he teaches a factor of safety of
four? A. I do not say that he teaches a factor 660
of safety of four.

Q. Or five? A. Or five.

Q. Or six? A. Or six.

Q. Do either Greiner or Jacobi teach any fac-
tor of safety below six? A. They do not teach
the factor of safety.

Q. Then you don't claim that the factor of

A. J. Dillenbeck, for Pltf., Cross.

661 safety that you have used is based on their teaching? A. We do not—

Q. (Int'g) I say you do not claim that your factor of safety of four is based on the teaching of either Greiner or Jacobi? A. I do.

Q. You do? A. I do.

Q. You figure that your bridge will uphold a load of four times 18, or 72 tons, is that it? A. Yes, sir, and more too.

662 Q. Now, if you have 12 tons going one way and 18 tons going the other that makes how many tons? A. 30 tons.

Q. Does it add anything to the strain if one is moving one way and the other the other way at the same time at the moment when they pass? A. I have allowed for an impact of 30 per cent.

663 Q. That is because one was passing one way and the other the other, that would add 30 per cent? A. Not due to their passing but to the moving load.

Q. Is that it? A. It is due to the moving load; I have added 30 per cent.

Q. Now, 30 per cent added to 30 tons gives you how many tons? A. 39.

Q. 39 tons? A. Yes.

664 Q. And four times 39 tons is how many tons? A. 156.

Q. Then your factor of safety when you have these things passing isn't a factor of safety of four at all, is it? A. You have assumed that I have designed for 18 tons only. I told you that I did design for an 18 ton truck load.

Q. Isn't it true that you told me that your

A. J. Dillenbeck, for Pltf., Cross.

maximum load was 72 tons for which you designed this bridge? A. No. 665

Q. That is, it was 18 multiplied by four? A. No; if I remember correctly you asked me if it would hold up 72 tons.

Q. What did you figure on having this bridge actually hold up before it would break? A. I did not figure on a breaking load. I figured—

Q. (Int'g) How did you get your factor of safety if you didn't figure on a breaking load? 666
A. In ordinary engineering work we assume a certain stress per square inch, which is known as a safe stress to work under.

Q. How did you get your factor of safety at four? A. I didn't get any factor of safety at four.

Q. You said you had the factor of safety at four? A. I did say I had the factor of safety at four, but I didn't say I didn't have more than that. 667

Q. Did you have more than that? A. That I don't know. There is no one who can tell what steel will break at. We do know that a certain stress is safe. It may break at four times that. It may break at six times that. It may break at eight times that, but no one can say definitely that steel will break at a certain point. We do know a certain stress is a safe stress to use, and that is what all engineers do in practice. 668

Q. What stress did you take? A. 16,000 pounds per square inch.

Q. That is the stress for a load of how much?
A. If you apply a load—

A. J. Dillenbeck, for Plff., Cross.

669 Q. (Int'g) That is the stress for a load of how much? A. I can't answer that question.

Q. Why did you tell me that you had figured on a bridge for a load of 18 tons on four wheels distributed 10 feet, as to front and back wheels?

A. You misinterpreted my testimony. I said I was figuring on an 18 ton truck arrangement. Now that may mean one truck or it may mean

670

two.
Q. Why did you say you figured on a factor of safety of four? A. I said a factor of safety of four because I had at least that much; I may have had more.

Q. Give me your mathematical formula; give it right to the stenographer and we can work this out and that will cut it short. You have it in your book, haven't you? A. I have Greiner's specifications, if you want those; that is what I have here.

671

Q. You have used Greiner's specifications?
A. Yes.

Q. Give me your rational of this operation by which you reached your result? A. Do you realize there are a number of different formulas?

Q. I realize there are formulas as numerous
672 as there are witnesses. A. Do you want all those formulas?

Q. No, sir, I want yours. A. There is no one formula that applies to this.

Q. I want you to give the stenographer your formula which you say is right. A. The best I can do is to give you Greiner's specifications which cover all the steps.

A. J. Dillenbeck, for Pltf., Re-direct.

Q. Turn me to Greiner. If you don't know 673
anything about it let me have Greiner. If you
don't know anything about it let me have Greiner.

A. What feature would you like to know?

Q. I want the formula by which you made
your calculation.

(Witness presents same).

Q. You hand me "No. 1, steel stationary
bridges, by J. E. Greiner, consulting engineer, 674
for 1911," and you turn me to page 7, a diagram
showing "Concentrated live loads. All concen-
trations are axle loads in pounds." Does that
page 7 contain the process by which you reach
your conclusion that you have given us this morn-
ing? A. Yes, sir.

Q. Can you let me have them and have them
marked in evidence as an exhibit? A. No; that 675
does not belong to me.

Q. Who does it belong to? A. The firm
whom I represent.

Mr. Moot: I offer that in evidence.

Received and marked "Defendant's Ex-
hibit 48."

RE-DIRECT EXAMINATION by Mr. Ivins:

Q. As you have designed this bridge it was 676
intended for a single track bridge and not a
double track bridge, wasn't it; I mean it wasn't in
your plans that vehicles should pass on the
bridge? A. No.

Q. Have you ever studied law? A. No.

Q. How old are you? A. 24.

Q. You weren't alive in 1882 then? A. No.

C. Taylor, for Pltf., Direct.

677 CHARLES TAYLOR, sworn for plaintiff, testified:

Examined by Mr. Ivins:

Q. Mr. Taylor, what is your business? A. Ice cream manufacturer.

678 Q. Where do you live? A. At 237 Hampshire street, Buffalo, N. Y.

Q. Are you a member of the West Side Business Men's Association? A. Yes.

Q. Do you hold any office in that association? A. I am vice president and chairman of the execution committee.

Q. How long have you lived in Buffalo? A. Practically all my life; about 35 years.

679 Q. Do you live near Niagara street? A. About five blocks from Niagara street and about seven blocks from the Ferry street entrance to Squaw island.

Q. Niagara street is the street parallel to Black Rock harbor? A. Yes, that is the thoroughfare.

680 Q. That is the street that the trolley cars run down that have been spoken of several times? A. Yes.

Q. It is a pretty populous neighborhood? A. Yes, it is quite well built up.

(Mr. Ivins stated substantially, in reply to a question by the court, that he proposed to show by this witness that he had seen thousands of people on Squaw island; that at one time there was a picnic on the island

C. Taylor, for Pltf., Direct.

and he had seen several thousand people 681
there on that occasion and that he had
counted them).

By the Court:

Q. When was the picnic? A. Last summer
there was one and the summer before I was to
one picnic.

Q. 1915? A. 1915 and 1914.

Q. How many people did you count there at
that time? A. I didn't count the people; we
counted the tickets that were sold.

Q. Each person had a ticket? A. Yes.

Q. How many were there? A. Why, about
4000 people.

Q. How did they get over there? A. Some
came over in the little scow that ran back and
forth, that is, sort of a ferry, and some walked 683
down through the cow path from Ferry street.

Q. Some went over the Ferry street way and
some went in boats? A. Yes; I should estimate
it is about nearly two miles from Ferry street to
the point where they held some of the games, the
baseball games. The West Side Rowing Club
have races in the harbor, and while I didn't at-
tempt to count the people who were there it look- 684
ed to me as though there were 20 or 25 thousand
people, from my experience of the number of
tickets we sold.

Q. 20 or 25 thousand people on the island?
A. Not on the island, along both sides of the
river.

H. R. Safford, re-called for Deft., Cross.

685 By Mr. Ivins:

Q. Are you familiar with land values along Niagara street? A. No, I couldn't say that I am because I have never bought any property there.

(No cross examination).

686

H. ROBINSON SAFFORD, re-called for further Cross Examination:

Examined by Mr. Ivins:

Q. Mr. Safford, the bridge across the Niagara river proper is a single track bridge? A. Yes.

687

Q. As an engineer what is the car capacity of the whole bridge, that is from shore to shore, how many cars could be brought across allowing an equal number going in each direction, how many cars would cross the bridge from the Canadian side to Black Rock in a day, the maximum?

688

The Court: That draw bridge is 1200 feet long and the little bridge is 431 feet long.

Mr. Ivins: What I want to know is the capacity of the bridge for handling traffic.

Mr. Moot: That I object to as incompetent and improper.

Mr. Ivins: I will withdraw the question.

H. R. Safford, re-called for Deft., Re-direct.

RE-DIRECT EXAMINATION by Mr. Moot: 689

Q. In what was said in the negotiations between you and Mr. Kellogg before the passage of this law, at the time that he mentioned in your hearing, or after the passage of the law, as to your estimate of the maintenance and expense of this bridge, you covered what items in your estimate? A. That question isn't very general. It applied only to the cost of the roadway on the bridge. It was a very tentative discussion, an estimate of the probable cost of employing toll keepers; practically no cost covering the approaches to the bridge, which were in this discussion to be built by the Development Company, and the expense of toll keepers on the bridge was as before stated, along the most general lines, and with the expectation that the business at that time might not require, at the beginning at least, but the services of two men day and night; the negotiations didn't get to a point where the exact cost could be very definitely fixed. 690

Q. You didn't undertake, in other words, to cover interest on the investment or depreciation on the bridge or any items of that general character? A. We did cover interest on the investment in the roadway arm and the depreciation on that arm, but not on the approach. 691

Q. The figures you gave us yesterday covered the other items? A. Yes. 692

Q. And were more accurate? A. Yes.

Q. The difference in cost of that estimate, as you gave it, and as the witness gave it this morn-

H. R. Safford, re-called for Deft., Re-direct.

693 ing, depended upon whether you allowed for a
bridge sufficient to carry passing loaded vehicles
with the state maximum of 18 tons for a steam
roller and having it wide enough so they could
pass, in other words, 16 feet wide? A. Well,
without having seen his exact calculation, it ap-
peared that the difference must be due to the fact
that he didn't figure on quite as heavy a maximum
load as I did, and that the bridge was to be not
694 quite so wide.

Q. You figured on a maximum load of 18 tons,
as the state does for its highway bridges? A.
No; we figured on a maximum load of a trolley
car.

Q. Which is how many tons? A. 100,000
pounds or 50 tons.

Q. Two steam rollers of two loads of 18 tons
695 passing each other would be 36 tons? A. Yes,
calculating the bridge at the specification today
for the New York State Highway Commission—
I will express that a little differently. Taking
the present specification of the New York High-
way Commission for the loading of highway
bridges, which provides for a steam roller of 18
tons, we found from some calculations recently
696 made that the amount of steel which would be
required on this arm to conform to that specifica-
tion was very little less than that required for
the specification we had used some years ago,
namely a 50 ton car.

Q. For a trolley car? A. A 50 ton trolley
car.

Q. So you figured on a 50 ton trolley car

H. R. Safford, re-called for Deft., Re-direct.

as you mentioned as the proper factor of safety 697
according to engineering practice? A. Yes.

Q. That was the basis of your figures yesterday? A. That was the basis of the plan.

Mr. Baker: I offer this photograph in evidence which is dated June 17, 1916, and shows the southeast abutment of the Black Rock harbor bridge, also the abutment of the southwest side of the bridge, which is designed for the placing of the proposed roadway and footpath. 698

The Court: It shows an abutment, it doesn't show what it was designed for.

Received and marked "Plff's Ex. I."

Mr. Baker: I offer this photograph in evidence, bearing date June 17, 1916, showing the same as the other photograph, and a portion of the south end of Squaw Island. 699

Received and marked "Plff's Ex. J."

Mr. Baker: I offer in evidence photograph dated June 17, 1916, showing a portion of the east end of the island, a portion of Black Rock Harbor and the property to the east thereof.

Received and marked "Plff's Ex. K." 700

Mr. Baker: I offer in evidence a photograph bearing date June 17, 1916, showing a portion of the bridge across Niagara river and a portion of the bridge across Black Rock Harbor and the embankment on Squaw Island between.

Received and marked "Plff's Ex. L."

Offering of Exhibits.

701

Mr. Moot: It is stipulated that a photograph may be produced by Mr. Baker, which he says is correct, showing the approach on the bridge from the Niagara street side, and I stipulate that he may put it in when he finds it.

702

Mr. Ivins: I offer in evidence a statement handed to me by Mr. Moot, which appears to give a quotation from Poor's Manual of 1910, covering the International Bridge Company for the year ended June 30, 1909, showing the balance sheet as stated in Poor's Manual, and also a statement of what the correct figures should be.

Received and marked "Plff's Ex. M."

703

Mr. Ivins: I offer in evidence a similar statement with regard to Poor's Manual for 1911.

Received and marked "Plff's Ex. N."

Mr. Moot: These of course I take it, your Honor, are subject to my objection as to their competency. I understand your Honor will let them in subject to my exception?

704

The Court: Yes.

Mr. Ivins: I offer a similar statement from Poor's Manual of 1912.

Received and marked "Plff's Ex. O."

Mr. Ivins: Also a similar statement from Poor's Manual for 1913.

Received and marked "Plff's Ex. P."

Mr. Ivins: Also a similar statement from Poor's Manual of 1914.

Offering of Exhibits.

Received and marked "Plff's Ex. Q." 705

Mr. Ivins: I offer in evidence Poor's Manual for 1915, where at pages 1827 and 1828 the statistics of the International Bridge Company are given, which are conceded by Mr. Moot to be correct summaries.

Received and marked "Plff's Ex. R and R-1."

Mr. Ivins: I offer in evidence three letters from the War Department. 706

Mr. Moot: I object to their competency, and not bearing on any issue in the case.

Objection overruled. Defendant excepted.

Received and marked "Plff's Exs. S, T and U."

Mr. Ivins: I offer in evidence Chapter 135 of the laws of 1858. 707

A copy of same was received and marked "Plff's Ex. V."

Mr. Ivins: Also offer Chapter 54 of the laws of 1862.

Received and marked "Plff's Ex. W."

Mr. Ivins: Also Chapter ²³⁵~~390~~ of the laws of 1867.

Received and marked "Plff's Ex. X." 708

Mr. Ivins: Also Chapter 390 of the laws of 1871.

Received and marked "Plff's Ex. Y."

Now I offer in evidence a certified copy of the annual report made by the International Bridge Company to the State Tax Department of the State of New York, and verified November 12, 1913.

Defendant's Exhibit 9.

709 Mr. Moot: I take it that will be received under your Honor's ruling and will be subject to my objection and exception?

The Court: Yes.

Received and marked "Plff's Ex. Z."

Mr. Ivins: I offer a similar certified copy of a similar tax report, verified November 5, 1914.

710 Received and marked "Plff's Ex. AA."

Mr. Ivins: I offer a certified copy of a similar statement, verified November 15, 1915.

Received and marked "Plff's Ex. BB."

Mr. Ivins: That is all the plaintiff's rebuttal.

Mr. Moot: I offer in evidence this Squaw island map.

711 Received and marked "Deft's Ex. 49."

Testimony closed.

DEFENDANT'S EXHIBIT 9.

THE ATTORNEY GENERAL v. THE INTERNATIONAL BRIDGE COMPANY,

712 6 Ontario Appeals Reports, 537.

Injunction—Bridge company—Specific performance of Acts of Parliament—Attorney General of Ontario—Locus standi.

The defendants were a company incorporated by the Dominion Parliament for the construction of a bridge from Canada to the United States,

Defendant's Exhibit 9.

across the Niagara river, which was to be as well for the passage of persons on foot and in carriages, and otherwise, as for the passage of railway trains. The company completed the bridge for railway purposes only. The time limited by the charter for the completion of the work having elapsed, an information was filed seeking to restrain the use of the bridge by a railway company to which the bridge had been leased, until put in condition for ordinary traffic, or for the removal of the bridge as a nuisance, and to compel permission of its use by foot passengers on payment of the statutory tolls. 713

bridge, owing it is said to engineering difficulties, could not be adopted to the use of carriages and foot passengers. 714

Held, reversing the judgment of SPRAGGE, C., reported in 28 Grant 65, that the abandonment of that portion of the work relating to foot passengers and carriages was not a public nuisance; and the Act of incorporation was not a contract with the public, but merely gave conditional powers creating correlative duties, and was permissive; and that specific performance thereof would not be enforced. 715

Held, also, that the Attorney-General for Ontario, as representing only a limited portion of the public with whom, if at all, such contracts existed, had no *locus standi*. 716

The work being one within the jurisdiction of the Parliament of Canada, that parliament, pre-

Defendant's Exhibit 9.

717 sumably with the knowledge of the state of the
bridge, allowed debentures to be issued upon it.

Held, upon this ground also the Attorney-General of Ontario was not the proper party to file the information.

718 Held, also, that as the bridge extended beyond the limits of the Province, part only being therein, it would be unavailing for the court to give the public the right to pass over that part of the bridge only which was within its jurisdiction; and for this reason, also, the court would not interfere.

719 This was an appeal from the judgment of Spragge C., reported in 28 Gr. 65, where the facts are fully stated.

On May 19th. 1881, the appeal was argued (a). E. Blake, Q. C., and Walter Cassels for the appellants. MacLennan, Q. C., and McCarthy, Q. C., for the respondents, Blake, Q. C., in reply:

720 November 28, 1881. Burton J. A.—The information in this case is based on the assumption that the bridge, not having been constructed in conformity with the requirements of the Act of Parliament authorizing its construction, is not the structure authorized by the Legislature and a nuisance, and the principal prayer of the information is directed to obtaining the decree of the court to abate the nuisance and remove the

Defendant's Exhibit 9.

structure from the navigable waters of the Niagara river, and I do not for a moment doubt the right of the Attorney-General of Ontario to represent the public in any such case, either in equity or by prosecution at law. There is abundance of authority for informations directed to the repression of acts which the parties had no legal right to do, and which were not only authorized to be done, but were in fact acts of public nuisance. If, for example, the company had proceeded to build one of the piers and had then abandoned the work there could be no question of the right of the Attorney-General to prefer an indictment for a nuisance, or to take such other proceedings as he might find most expedient to guard the public interest; but the decree is not based upon that prayer of the bill, and although the argument was faintly renewed before us that the bridge, not having been completed so as to serve all the purposes referred to in the Act, is a nuisance, it is perfectly manifest, for the reasons stated by the learned Chancellor, that that contention cannot prevail. The piers, which alone could constitute the impediment to the free navigation of the river, are not complained of, and the main structure, that is the bridge for the conveyance of trains has been built in a manner which is shown to be admirably adopted to this purpose; and to hold that such a structure, which has been put up at an enormous expenditure of skill and money, and upon which the Legislature had authorized a debt of several hundred thousand dollars to be charged,

Defendant's Exhibit 9.

725 could be abated as a nuisance, because the company has omitted or refused to complete some portion of the structure intended for the use of carriages and foot passengers, and not in the slightest degree affecting the navigation of the river, would be a reflection on the administration of justice. The fallacy consists in calling the abandonment of a portion of the work a public
726 nuisance, instead of, what it probably is, an abuse of the Act of Parliament.

If the information had contained only such allegations as those upon which the decree is based, omitting all reference to the structure being a nuisance, and confining its prayer to the relief now granted, I apprehend it would have been
727 demurrable, both on the ground that no contract with the public is shewn, and because the Attorney-General for Ontario, who can represent only a limited portion of the public with whom, if at all, such a contract exists, has no *locus standi* on such an application.

The work is one within the jurisdiction of the Government and Parliament of Canada. That
728 Parliament, presumably with the knowledge that it was only completed for railway traffic, has nevertheless recognized it, and allowed a large amount of debentures to be issued, and charged upon it, and upon which therefore the holders rely for repayment; and it may be that the Attorney-General of the Dominion, acting for the Crown, is not disposed to exact this further per-

Defendant's Exhibit 9.

formance, or may be prepared to recommend the 729
 passage of a bill to dispense with it. It would be
 a strange anomaly if, notwithstanding this be-
 ing the feeling of the Dominion authorities, a
 bill could be filed by the Attorney-General of the
 Province seeking in effect to compel the specific
 performance of this Act of Parliament. Regard-
 ed therefore in that light, I am disposed to think
 the Attorney-General of Ontario is not the prop- 730
 er party to file this information.

But I am of opinion that no grounds have
 been shewn for the interference of the court. It
 is now perfectly well established, since the de-
 cision of the Exchequer Chamber in *Regina v.*
York and North Midland R. W. Co., 1 E. & B.
 858, that Acts of this description are not to be
 regarded, as they had come to be regarded, as 731
 contracts: That they are what they profess to
 be and nothing more; they give conditional pow-
 ers which if acted upon will carry with them
 duties. Statutes may be so framed as to render
 it obligatory upon the companies to proceed with
 the works, but that it not so in the present case;
 the words of the Act are simply permissive; nor
 is there, in my opinion, anything in the argument 732
 that although originally permissive it ceased to
 be so and became obligatory when once begun.
 Suppose the company had constructed the foot-
 way as the least expensive portion of the work,
 and then finding the railway bridge too expen-
 sive had abandoned it, could it be contended with
 any force that the shareholders should, at a

Defendant's Exhibit 9.

733 ruinous loss to themselves, proceed with its construction? Yet that must follow, if this argument be sound.

734 It would have been a very different matter if the works had been fully completed. I do not for a moment doubt that in such case a company could be compelled by mandamus or decree of this court fairly and fully to carry out the objects for which they were created: *Rex v. Severn and Wye R. W. Co.*, 2 B & A1. 645.

735 For these reasons I think this decree cannot be supported, for I assume the fact to be, not that a foot-way for passengers had been made, but that parties can manage to pass on foot by the side of the track, and that that portion of the bridge has not been completed any more than the carriage-way in compliance with the Act of Parliament. But I think that independently of these considerations it is manifest that the jurisdiction of this court to grant relief cannot extend beyond the limits of the Province, and it being a fundamental principle of the law of mandamus, as well as of injunction, that it will never
736 be granted in cases where if issued it would prove unavailable, there could be no object in giving the public the right to pass over the bridge as far only as Squaw island; and if for no other reason this court should not interfere.

I am of opinion, therefore, that the appeal should be allowed, and the information dismissed, with costs.

Stipulation as to Case.

Patterson and Morrison, JJ. A., and Osler, J., 737
concurring.

* Appeal allowed.

STIPULATION AS TO CASE.

STATE OF NEW YORK.

SUPREME COURT—ALBANY COUNTY.

738

PEOPLE OF THE STATE
OF NEW YORK,

Plaintiff-Respondent,

vs.

INTERNATIONAL BRIDGE
COMPANY,

Defendant-Appellant.

739

IT IS HEREBY STIPULATED AND
AGREED that the said case and exceptions which
contains all the evidence and proceedings taken
upon the trial of this action may be settled, signed
and ordered filed in the office of the Clerk of
the County of Albany, New York.

740

Dated, day of , 1916.

EGBURT E. WOODBURY,

*Attorney General,**Attorney for Plaintiff.*

MOOT, SPRAGUE, BROWNELL & MARCY,

Attorneys for Defendant.

Stipulation, Waiver of Certification.

741

ORDER TO FILE.

SUPREME COURT—ALBANY COUNTY.

PEOPLE OF THE STATE
OF NEW YORK,

Plaintiff-Respondent,

vs.

INTERNATIONAL BRIDGE
COMPANY,

Defendant-Appellant.

742

The foregoing case and exceptions contains all the proceedings had on the trial of this action and the same is hereby settled and ordered filed in the office of the Clerk of the County of Albany, New York.

743

J. S. C.

STIPULATION, WAIVER OF CERTIFICATION.

SUPREME COURT—ALBANY COUNTY.

PEOPLE OF THE STATE
OF NEW YORK,

Plaintiff-Respondent,

vs.

INTERNATIONAL BRIDGE
COMPANY,

Defendant-Appellant.

744

IT IS HEREBY STIPULATED AND
AGREED by and between the attorneys for the

Stipulation and Waiver of Certification.

respective parties to the above entitled action 745
that the foregoing copies of summons, and com-
plaint, answer, request to find, decision, case and
exceptions, judgment, notice of appeals to the
Appellate Division and all papers and documents
in said case contained are true and correct tran-
scripts of and from the originals now on file in
the office of the Clerk of the County of Albany,
and that the same may stand on this appeal with 746
the same force and effect as if certified by the
clerk of said court; and

IT IS FURTHER STIPULATED, that any
and all of the plaintiff's exhibits and the defend-
ant's exhibits herein or any part thereof, wheth-
er printed in the record and made a part hereof
or not, may be produced and used upon the argu-
ment of this appeal and that all the exhibits may 747
be produced and used upon the argument of this
appeal with the same force and effect as if set
forth in the printed case on appeal herein.

EGBURT E. WOODBURY,
Attorney for Plaintiff-Respondent.

MOOT, SPRAGUE, BROWNELL & MARCY, 748
Attorneys for Defendant-Appellant.

NOTICE OF APPEAL TO COURT OF
APPEALS.

749

SUPREME COURT—ALBANY COUNTY.

THE PEOPLE OF THE
STATE OF NEW YORK,*Plaintiff-Respondents,*

against

THE INTERNATIONAL
BRIDGE COMPANY,

750

Defendant-Appellant.

Sirs:

PLEASE TAKE NOTICE that the above named defendant hereby appeals to the Court of Appeals from the judgment of affirmance entered in Albany County Clerk's office on the 2nd day of August, 1917, on an order of the Appellate Division, Supreme Court, Third Department, entered in the office of the Clerk of Albany County on the 7th day of July, 1917; affirming, with costs, the judgment of the Supreme Court entered on the 20th day of November, 1916, in the office of the Clerk of the County of Albany, in favor of the plaintiffs and against the defendant, for the sum of Seven Hundred and Forty-four Dollars and Forty-two Cents (\$744.42). And the said defendant appeals from each and every part of said judgment of affirmance and from the whole thereof.

752

Dated, August 3rd, 1917.

MOOT, SPRAGUE, BROWNELL & MARCY,

Attorneys for Defendant-Appellant,

Office & P. O. Address,

302 Erie County Savings Bank Bldg.,

Buffalo, N. Y.

Order of Affirmance.

To 753
 ! The Clerk of the County of Albany,
 And to
 Hon. Merton E. Lewis,
Attorney General.

ORDER OF AFFIRMANCE. 754

At a term of the Appellate Division of the
 Supreme Court held in and for the
 Third Judicial Department at Albany,
 commencing May 1, 1917.

Present: Hon. John M. Kellogg,
Presiding Justice. 755
 Hon. George F. Lyon,
 Hon. John Woodward,
 Hon. A. V. S. Cochrane,
 Hon. Albert H. Sewell,
Justices.

THE PEOPLE OF THE	}	756
STATE OF NEW YORK,		
<i>Plaintiffs-Respondents,</i>		
vs.		
THE INTERNATIONAL	}	
BRIDGE COMPANY,		
<i>Defendant-Appellant.</i>		

An appeal having been taken to this court, by
 the defendant, from a judgment of the Supreme

Judgment of Affirmance.

- 757 Court entered on the 20th day of November, 1916,
in the office of the Clerk of the County of Al-
bany, in favor of the plaintiffs and against the
defendant for the sum of seven hundred forty-
four and 42/100 (\$744.42) dollars, and said ap-
peal having been argued by Adelbert Moot, Esq.,
of counsel for the appellant, and by James S. Y.
Ivins, Esq., of counsel for the respondents, and
758 due deliberation having been had, it is hereby
unanimously

ORDERED AND ADJUDGED that the judg-
ment so appealed from be in all things affirmed,
and that the respondents recover of the appellant
the costs of this appeal.

JOSEPH H. HOLLANDS,

759

Clerk.

JUDGMENT OF AFFIRMANCE.

SUPREME COURT—ALBANY COUNTY.

760

PEOPLE OF THE STATE OF
NEW YORK,

Plaintiffs,

vs.

THE INTERNATIONAL
BRIDGE COMPANY,

Defendants.

The above named defendant, The International
Bridge Company, having duly appealed to the

Judgment of Affirmance.

Appellate Division of the Supreme Court from 761
the judgment of the Supreme Court entered in
the office of the Clerk of the County of Albany
on the 20th day of November, 1916, in favor of the
plaintiff and against the defendant, for the sum
of seven hundred forty-four and 42/100 (\$744.42)
dollars, and the said Appellate Division of the
Supreme Court having rendered its decision af-
firming said judgment and order, unanimously 762
affirmed said judgment with costs to the plain-
tiffs-respondents and a certified copy of the or-
der of said Appellate Division having been duly
taxed by the clerk of this court:

NOW, on motion of Merton E. Lewis, Attorney
General, attorney for the plaintiffs, it is

ORDERED, ADJUDGED and DECREED that 763
the judgment so appealed from be, and the same
hereby is in all things affirmed, and it is further

ADJUDGED that the plaintiffs, the People of
the State of New York, recover of the defendant,
International Bridge Company, the sum of
\$163.00 the costs of said appeal, and that the
plaintiffs have execution therefor.

764

Judgment this 2nd day of August, 1917.

L. C. WARNER,

Clerk.

AFFIDAVIT OF NO OPINION.

765

STATE OF NEW YORK.

COURT OF APPEALS.

PEOPLE OF THE STATE OF
NEW YORK,

Plaintiff-Respondent,

vs.

766

INTERNATIONAL BRIDGE
COMPANY,

Defendant-Appellant.

State of New York,

County of Erie,

City of Buffalo.

} ss.:

767

GERALD WARD BROOKS, being duly sworn, deposes and says; that he is managing clerk in the office of Moot, Sprague, Brownell & Marcy, attorneys for the defendant-appellant, above-named; that deponent is informed and verily believes that no opinion was written or handed down by the Appellate Division of the Third Department, or any of the judges thereof, in granting the order of affirmance in this case.

768

GERALD WARD BROOKS.

Subscribed and sworn to before
me this 21st day of September, 1917.

James C. Sweeney,

Notary Public in and for
Erie Co., New York.

STIPULATION AND WAIVER OF CERTI-
FICATION.

769

SUPREME COURT.

COURT OF APPEALS.

THE PEOPLE OF THE
STATE OF NEW YORK,

Plaintiff-Respondent,

against

INTERNATIONAL BRIDGE
COMPANY,

Defendant-Appellant.

770

IT IS HEREBY STIPULATED AND
AGREED that the foregoing case and excep-
tions contains all the evidence and proceedings
taken upon the trial of this action, and

771

IT IS FURTHER HEREBY STIPULATED
AND AGREED that the foregoing copies of sum-
mons and complaint, answer, request to find, de-
cision, case and exceptions, judgment, notice of
appeal to the Appellate Division, order of af-
firmance of Appellate Division, judgment of af-
firmance and notice of appeal to the Court of 772
Appeals, and all papers and documents in said
case contained, are true and correct transcripts
of and from the originals now on file in the office
of the Clerk of the County of Albany, and that
the same may stand on this appeal with the same
force and effect as if certified by the clerk of said
county, and

Stipulation and Waiver of Certification.

773 IT IS FURTHER STIPULATED that any
and all of the plaintiff's exhibits and the defend-
ant's exhibits herein, or any part thereof, wheth-
er printed in the record, and made a part hereof,
or not, may be produced and used upon the argu-
ment of this appeal, and that all exhibits may be
produced and used upon the argument of this ap-
774 peal with the same force and effect as if set forth
in the printed case herein.

MERTON E. LEWIS,
Attorney for Plaintiff-Respondent.

MOOT, SPRAGUE, BROWNELL & MARCY,
Attorneys for Defendant-Appellant.

775

776

No. 2.

Supreme Court of the United States.

INTERNATIONAL BRIDGE COMPANY, Plaintiff in Error,
against

PEOPLE OF THE STATE OF NEW YORK, Defendant in Error.

It is hereby stipulated by and between the attorneys for the respective parties hereto that the annexed is a true copy of the opinion rendered herein by the Court of Appeals of the State of New York and that the same may be filed in the office of the Clerk of the County of Albany and may be annexed by said clerk to the record in this case and returned as part of said record to the Supreme Court of the United States.

Dated June 18, 1918.

MOOT, SPRAGUE, BROWNELL &
MARCY,

Attorneys for Plaintiff in Error.

MERTON E. LEWIS,

J. S. Y. I.,

Attorney General, for Defendant in Error.

[Endorsed:] Albany County N. Y. Filed Jun- 25, 1918. Clerk's Office.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
v.

INTERNATIONAL BRIDGE COMPANY, Appellant.

(Decided March 12, 1918.)

Appeal from a judgment of the Appellate Division, third department, unanimously affirming a judgment entered upon a decision after trial at Special Term. The facts, so far as material, are stated in the opinion.

Adelbert Moot for appellant.

Merton E. Lewis, Attorney-General (James S. Y. Ivins of counsel),
for respondent.

McLAUGHLIN, J.:

This action was brought to recover penalties aggregating \$500, alleged to have been incurred by defendant's failure to construct, before January 1, 1916, as required by chapter 666 of the Laws of 1915, a roadway for vehicles and a pathway for pedestrians upon its bridge across Black Rock harbor from land in the state of New York

to Squaw island in the Niagara river. The Answer admitted the failure to construct such ways but denied that defendant was liable for the penalties alleged. It also set up affirmative defenses to the effect that the act of 1915 was unconstitutional and void. At the trial the plaintiff had a judgment for the amount claimed, which was unanimously affirmed by the Appellate Division, and defendant appeals to this court.

The defendant is a New York corporation. By chapter 753 of the Laws of 1857 a corporation by the same name was formed for the purpose of constructing a bridge across the Niagara river near the city of Buffalo, and a provision was inserted in the act to the effect that the bridge might be built as well for the passage of persons on foot and in carriage as for the passage of railroad trains. About the same time the Canadian government passed a somewhat similar act (20 Victoria, chap. 227) incorporating a company by the same name and for the same purposes. That act also contained a provision to the effect that the bridge, when constructed, "shall be as well for the passage of persons on foot and in carriages and otherwise as for the passage of railroad trains." In 1869 these two corporations were consolidated by an act of the legislature of the state of New York with "all the rights, privileges and franchises, and subject to all the disabilities and duties of each of such corporations so consolidated." (Laws of 1869, chap. 550, section 6.) The charter thus obtained by defendant was confirmed by the Congress of the United States. (Laws of 1870, chap. 176.) Thereafter, and between 1870

and 1874, defendant constructed a bridge across the Niagara river opposite the city of Buffalo, but no provision was made for vehicles or foot passengers thereon. In 1899, or some time prior thereto, defendant submitted a plan for approval to the secretary of war of the United States for the reconstruction of the bridge. Such plan was approved and showed upon either side of the proposed reconstructed bridge a passageway for pedestrians and vehicles. The bridge was reconstructed according to the plan, except no passageway for pedestrians or vehicles was provided. Some time thereafter the United States government, with a view of obtaining a suitable channel for deep water craft around the rocks and shoals at the head of the Niagara river, acquired from the state of New York (Laws of 1904, chap. 373) all its right and title to the lands and waterways necessary for the contemplated improvement, including the land under the water of Black Rock harbor and that portion of the Erie canal adjacent thereto. In 1907 the secretary of war gave notice to the defendant that its bridge over Black Rock harbor and the Erie canal was an unreasonable obstruction to navigation, and that the same must be removed and a new one constructed according to certain requirements specified. Pursuant to this notice defendant submitted a plan for the rebuilding of the bridge to the secretary of war, who approved the same. This plan showed on either side, by dotted lines, a way for pedestrians and vehicles, and contained a statement that "roadways shown in dotted lines not to be put in at present but provision is made in the design of the bridge for their future construction." The bridge was reconstructed in pursuance of

this plan but the roadways were not then and have not since been built.

In 1915 the legislature of this state passed the act before referred to, under which the penalties stated have been recovered. The first section of the act provides that chapter 753 of the Laws of 1857, entitled "An Act to incorporate the International Bridge Company" is hereby amended by adding thereto a new section, to be known as section 15-a. This new section provides in substance that a roadway for vehicles and a pathway for pedestrians shall be constructed upon the draw across Black Rock harbor between Squaw island and the mainland of New York state and be ready for use by January 1, 1916, and if defendant or its successor in interest did not complete the same on or before that time, then it or its successor should be liable to a penalty of fifty dollars for each day it remained in default, the same to be sued for and collected by the attorney-general of the state. The act also contains a provision to the effect that after the ways have been completed, tolls might be required to be paid by persons using them. The roadway and pathway were not built, and this action followed with the result before stated.

The validity of the judgment which has been recovered is attacked principally upon three grounds, which will hereafter be considered in the order named:

(a) That the act of 1915 is unconstitutional in that it violates the provision of a contract—the charter granted in 1857—by imposing additional burdens and obligations upon the defendant.

(b) That the Federal government has taken exclusive control of the bridge, or at least to such an extent as to prevent the state of New York legislating in any way with reference thereto.

(c) That the act of 1915 is confiscatory and deprives the defendant of its property rights without due process of law.

1. The International Bridge Company, by the act of 1857, obtained from the state of New York the right to build a bridge over and in New York to the center of the Niagara river. It may well be doubted whether, in view of the language used in the act, the bridge company were obligated, if it built a bridge, to provide a way for carriages and pedestrians. The state, of course, in granting the charter, reserved to itself the right to amend it at any time, but this reservation did not authorize the state, the charter having been accepted and acted upon to the extent that it had ripened into property rights, to deprive defendant of the benefits thus obtained without compensation. (*Monongahela Navigation Co. v. United States*, 148 U. S. 312; *People v. O'Brien*, 111 N. Y. 1.) Nor could the state impair the value of the franchise by imposing additional burdens without paying for it. (*Trustees of Southampton v. Jessup*, 162 N. Y. 122.) Does the act of 1915 deprive this defendant of any rights which it obtained by the act of 1857 or impose upon it burdens not thereby imposed? I think not. Defendant did not construct a bridge under that act. The bridge which was constructed was built after the corporations formed by the act of 1857 and the Canadian act had been consolidated into the present corporation by chapter 550 of the Laws of 1869. If it be assumed the act of 1857 did not impose an obligation upon the defendant to build ways for

pedestrians and vehicles, the Canadian act certainly did. The language of that act was: "Said bridge shall be constructed as well for the passage of persons on foot and in carriages and otherwise as for the passage of railroad trains." When the two corporations, therefore, were consolidated, with their consent and the consent of the state of New York, the defendant became obligated to construct a bridge for railroad trains, foot passengers and vehicles. The charter thus given by the consolidating act was accepted subject to whatever duties were imposed upon either or both of the old corporations. The bridge, as we have seen, was built under the consolidating act, but provision was made only for railroad trains.

199 It had by the acceptance of the charter obligated itself to build one also for pedestrians and vehicles. Compelling it to keep its implied agreement to do what the charter required does not impair the obligation of the contract or impose additional burdens. In my opinion the act of 1915 is a valid legislative enactment.

2. After the consolidation took place the defendant had the right to build the bridge. The state of New York, however, had the title to, and governmental control of, the land under the waters of the river. This control, nevertheless, was subject to the supervision of the United States in so far as commerce was concerned, but this supervision did not give to the United States government, as against the state of New York, authority to construct a bridge, nor could it take the state's property in the bed of the river for that purpose any more than it could take property elsewhere without condemnation and payment. It could give its consent to the construction of a bridge upon such terms as it saw fit and even after the bridge was built, if it interfered with commerce, could withdraw its consent and compel its removal. It did consent that defendant construct piers for the bridge on property of the state and the bridge, with the consent of the state, was built on such property. No way was provided for pedestrians or vehicles. It was built primarily for interstate and foreign commerce, but this did not give the United States any other or greater supervision over it than it otherwise had. It could simply regulate its use for interstate and foreign commerce. This did not subject the defendant to the control of the United States government in any other respect. It still remained a New York corporation which state had the power to regulate within its limits matters of internal police, including in that general designation "whatever would promote the peace, comfort, convenience and prosperity of its people." This power included among other things the construction of bridges within its territory. It is only so much of the bridge which is here being considered as lies entirely within the state of New York, and while it gave the right, in the first instance, to construct the bridge, it retained the right, in the interest of the people of the state, to supervise and direct how it should be used, subject only to the Federal government's regulations so far as such use might relate to interstate and foreign commerce. The relation thus existing between the parties was not, in my opinion, changed by the fact that the state of New York ceded to the United States the land under the waters of the Niagara river, including a portion of the Erie

the plaintiffs base their right to relief is that the United States, by the acts of Congress referred to and by what has been done under those acts, has taken 'possession' of the Calumet river, and so far as the erection in that river of structures such as bridges, docks, piers and the like is concerned, no jurisdiction or authority whatever remains with the local authorities. In a sense, but only in a limited sense, the United States has taken possession of Calumet river, by improving it, by causing it to be surveyed, and by establishing lines beyond which no dock or other structure shall be erected in the river without the approval or consent of the secretary of war, to whom has been committed the determination of such questions. But Congress has not passed any act under which parties, having simply the consent of the secretary, may erect structures in Calumet river without reference to the wishes of the state of Illinois on the subject.

* * * Calumet river, it must be remembered, is entirely within the limits of Illinois, and the authority of the State over it is plenary, subject only to such action as Congress may take in execution of its power under the Constitution to regulate commerce among the several States. That authority has been exercised by the State ever since it was admitted into the Union upon an equal footing with the original States. * * * The effect of that act, reasonably interpreted, is to make the erection of a structure in a navigable river, within the limits of a State, depend upon the concurrent or joint assent of both the National Government and the state government. The secretary of war, acting under the authority conferred by Congress, may assent to the erection by private parties of such a structure. Without such assent the structure cannot be erected by them. But under existing legislation they must, before proceeding under such an authority, obtain also the assent of the State acting by its constituted agencies." (p. 426.)

3. As to the contention that the act of 1915 is confiscatory and deprives defendant of its property without due process of law, but little need be said. The trial court found as a fact, and the finding has been unanimously affirmed by the Appellate Division, that "the probable cost of constructing the roadway and foot-path required by chapter 666 of the Laws of 1915, is insignificant in comparison to the assets and annual net earnings of the defendant." It also found, and this finding was also unanimously affirmed, that "there is no evidence in the record showing that the investment required by chapter 666 of the Laws of 1915 would not yield a reasonable return to the defendant." These findings, as it seems to me, are fatal to the appellant's claim. If the investment necessary for the construction of roadways would not enable defendant to earn a fair return upon its investment then it was incumbent upon it to establish that fact. (Willcox v. Consolidated Gas Co., 212 U. S. 19; Missouri Pacific Ry. Co. v. Kansas, 216 U. S. 262.) The court cannot assume, in the absence of such proof, that the act is confiscatory or that it in any way interferes with rights possessed by defendant.

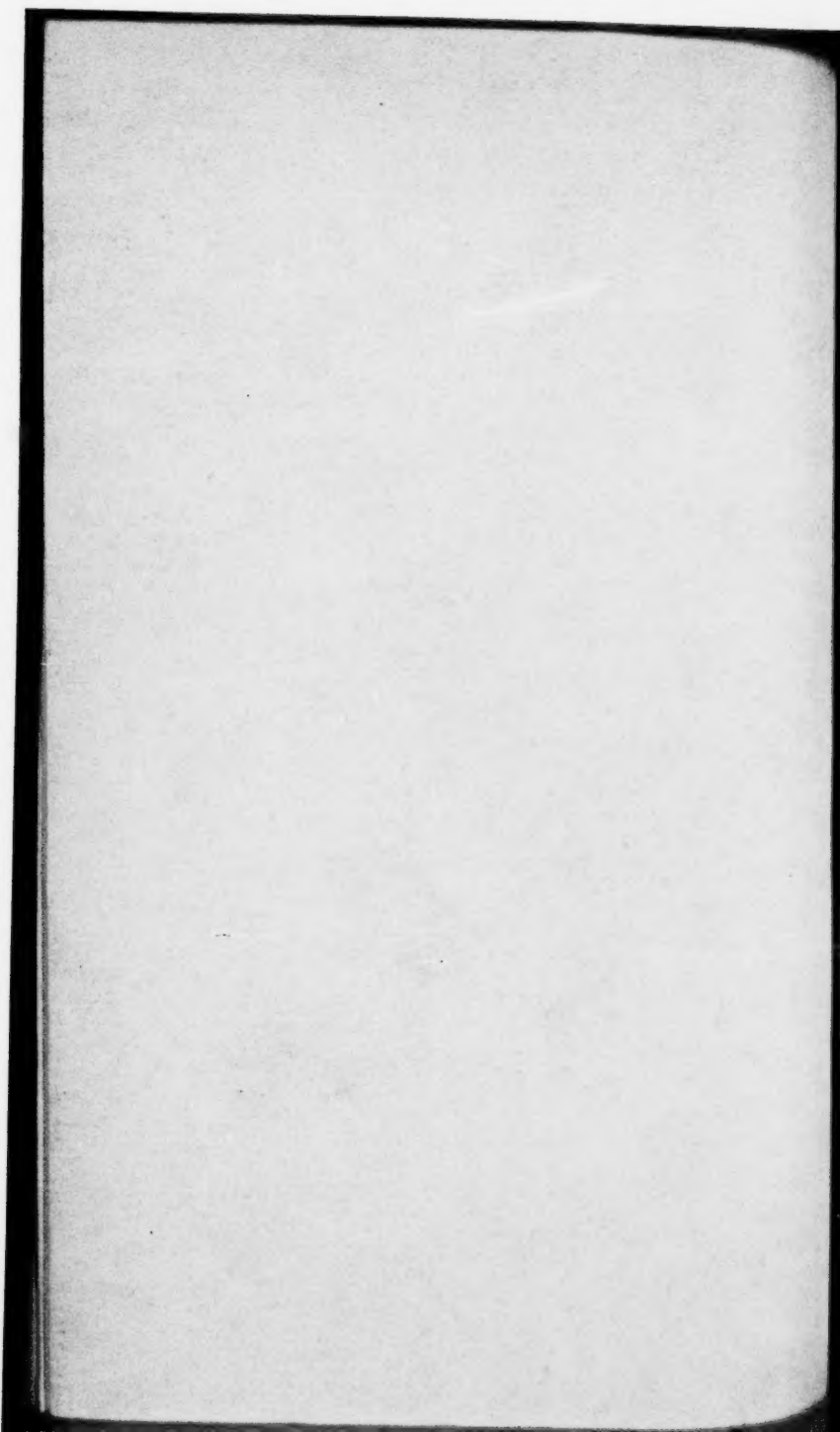
In my opinion the judgment is right and should be affirmed, with costs.

canal adjacent to Black Rock harbor. At the time the grant was made the bridge had been built. It rested on piers in the river. The grant, of course, was subject to visible rights then existing and theretofore obtained. These rights could not be destroyed by a grant from the state to the United States. As before indicated, the United States could, before acquiring the grant, have compelled the defendant to remove the bridge. It could have done this just as well before the grant was made as it could afterwards. The power to do this existed independent of the grant and in no way depended upon it. It was one which the Federal government inherently possessed for the purpose of controlling interstate and foreign commerce. (*Escanaba Co. v. Chicago*, 107 U. S. 678; *Cummings v. Chicago*, 188 U. S. 410.)

In the *Escanaba* case the question was as to the validity of the regulations made by the city of Chicago in reference to the closing, between certain hours of each day, of bridges across the Chicago river. Those regulations were alleged to be inconsistent with the power of Congress over interstate commerce. The court brushed aside such contention, saying: "The Chicago river and its branches must, therefore, be deemed navigable waters of the United States, over which Congress under its commercial power may exercise control to the extent necessary to protect, preserve, and improve their free navigation. But the States have full power to regulate within their limits matters of internal police, including in that general designation whatever will promote the peace, comfort, convenience, and prosperity of their people. This power embraces the construction of roads, canals, and bridges, and the establishment of ferries * * *. And nowhere could the power to control the bridges in that city, their construction, form, and strength, and the size of their draws, and the manner and times of using them, be better vested than with the State, or the authorities of the city upon whom it has devolved that duty. When its power is exercised, so as to unnecessarily obstruct the navigation of the river or its branches, Congress may interfere and remove the obstruction. * * *. But until Congress acts on the subject, the power of the State over bridges across its navigable streams is plenary." (p. 683.)

The case now before us, so far as the contention is made that the Federal government has assumed exclusive control of the bridge, is governed, as it seems to me, by *Cummings v. Chicago* (supra) and the authorities there cited. In that case the Calumet river was improved by the Federal government, but before such improvements were made the government required a conveyance to be made to it by owners of the land fronting on the river. With the consent of the secretary of war the plaintiffs commenced to build a dock in the river adjacent to their property, without obtaining a permit from the department of public works of the city of Chicago, as required by an ordinance, and the court held that they were subject to the ordinance and before the dock could be built had to obtain the city's consent. Mr. Justice Harlan, delivering the opinion of the court (and what he said is equally applicable to the question here presented) said: "The general proposition upon which

BLUEPRINT
TOO
LARGE
FOR
FILMING



Hiscock, Ch. J., Chase, Pound, Crane and Andrews, JJ., concur;
Hogan, J., concurs in result.
Judgment affirmed.

[Endorsed:] People v. International Bridge Co. McLaughlin, J.
Filed Jun- 25, 1918, Clerk's Office, Albany County, N. Y.

203

Vol. 3.

STATE OF NEW YORK:

Court of Appeals.

PEOPLE OF THE STATE OF NEW YORK, Plaintiff-Respondent,

vs.

INTERNATIONAL BRIDGE Co., Defendant-Appellant.

Exhibits.

Merton E. Lewis, Attorney-General, Attorney for Plaintiff-Respondent, Capitol, Albany, N. Y.

Moot, Sprague Brownell & Marey, Attorneys for Defendant-Appellant, 302 Erie Co. Bank Bldg., Buffalo, N. Y.

Albany County, N. Y., Clerk's office. Filed Jun- 22, 1918.

(Here follow blue prints marked pp. 204 to 207, inclusive.)

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Justices of the Supreme Court of the State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of New York before you or some of you, upon remittitur from the Court of Appeals, being the highest court of law or equity of the said state in which a decision could be had in the said suit between People of the State of New York and International Bridge Company, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity; or wherein was drawn in question the validity of a statute of or an authority exercised under said state on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such their validity, or wherein any title, right, privilege or immunity was claimed under the Constitution or any treaty or statute of or commission held or authority exercised under the United States, and the decision was against the title, right, privilege or immunity especially set up or claimed under such Constitution, treaty, statute, commission or authority, a manifest error hath happened to the great damage of the said International Bridge Company as by its complaint appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the

209 United States, together with this writ, so that you have the same in the said Supreme Court at Washington within thirty days from the date thereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 11th day of June, in the year of our Lord, one thousand nine hundred and eighteen.

[Seal United States District Court, N. Dist. of New York.]

W. S. DOOLITTLE,
*Clerk of the District Court of the United
States for the Northern District of New York.*

Allowed by

FRANK H. HISCOCK,

*Chief Judge of the Court of Appeals
of the State of New York.*

210 [Endorsed:] Supreme Court of the U. S. International Bridge Co., Pltf. in Error vs. People of the State of New York, Deft. in Error. Original. Writ of Error. Moot, Sprague, Brownell & Marcey, Attorneys for Pltf. in Error. Office and P. O. Address 45 Erie County Savings Bank Building Buffalo, N. Y. Filed June 12, 1918 in Albany Co. clerk's office.

211 No. 5.

Supreme Court of the United States.

INTERNATIONAL BRIDGE COMPANY, Plaintiff in Error,
against

PEOPLE OF THE STATE OF NEW YORK, Defendant in Error.

Know All Men By These Presents, That International Bridge Company, as principal, and The Guarantee Company of North America, as surety, are held and firmly bound unto the People of the State of New York, in the sum of Three Thousand Dollars (\$3,000.00) to be paid to the said People of the State of New York, to which payment well and truly to be made we bind, ourselves, jointly and severally by these presents, sealed with our seals and dated this 29th day of May, 1918.

[SEAL.]

INTERNATIONAL BRIDGE COMPANY,

(Signed)

By M. E. GILLEN,

Vice-President.

[SEAL.]

THE GUARANTEE COMPANY
OF NORTH AMERICA.

DANIEL J. TOMPKINS,

Resident Secretary.

WARD E. FLAXINGTON,

Attorney-in-Fact.

611,645.

Whereas, the above named plaintiff in error, International Bridge Company, has sued out of a Writ of Error from the United States Supreme Court to the Supreme Court of the State of New York to reverse the judgment of the Court of Appeals of the State of New York rendered on the 12th day of March, 1918, affirming the judgment of affirmance entered in Albany County Clerk's Office on the 2nd day of August, 1917, on an order of the Appellate Division of the Supreme Court, Third Department, entered on the 7th day of July, 1917, which affirmed the judgment of the Supreme Court, Albany County, entered in Albany County Clerk's Office on the 20th day of November, 1916, in the suit of the People of the State of New York against International Bridge Company, and the record in the said action having been remitted by said Court of Appeals to the Supreme Court of the State of New York,

Albany County, according to the form of the statute in such case made and provided, to be enforced according to law and which record now remains in said Supreme Court, and by an order of the Supreme Court entered on the 23rd day of March, 1918, in Albany County Clerk's Office, said judgment of the Court of Appeals was made the judgment of the Supreme Court and judgment of affirmance was entered on said remittitur in Albany County Clerk's Office on said same day.

Now, Therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute its said Writ of Error to effect and answer all costs and damages that may be adjudged, if they shall fail to make good their plea, then this obligation is to be void, otherwise to remain in full force and effect.

(Signed) INTERNATIONAL BRIDGE COMPANY,

By M. E. GILLEN,

Vice-President.

[SEAL.]

THE GUARANTEE COMPANY
OF NORTH AMERICA,

DANIEL J. TOMPKINS,

Resident Secretary.

WARD E. FLAXINGTON,

Attorney-in-Fact.

Approved this 11th day of June, 1918.

(Signed) FRANK H. HISCOCK,

Chief Judge of the Court of Appeals.

213 STATE OF NEW YORK,

City and County of New York, ss:

On this fifth day of June, one thousand nine hundred and eighteen, before me personally came Ward E. Flaxington, to me known and by me known to be an Attorney-in-Fact of The Guarantee Company of North America, the corporation described in and which executed the annexed Bond on behalf of the International Bridge Company, and the said Ward E. Flaxington being by me duly sworn, did depose and say that he resides in the City of New York, in the State of New York; that he is an Attorney-in-Fact of said The Guarantee Company of North America, and knows the corporate seal thereof; that the seal affixed to the said annexed instrument is such corporate seal and was thereto affixed by order and authority of the Board of Directors of said Company, and that he signed said annexed instrument as an Attorney-in-Fact of said Company by like order and authority; and that he is acquainted with Daniel J. Tompkins of the City of New York, and knows him to be the Resident Secretary of said Company and that the signature of said Daniel J. Tompkins subscribed to said annexed instrument is in the genuine handwriting of said Daniel J. Tompkins, and was thereto subscribed by order and authority of said Board of Directors and in the deponent's presence, and that said Company is duly incorporated under the laws of the

Dominion of Canada and is duly authorized under the laws of the State of New York to execute said annexed instrjment, and that the assets of said Company within the United States, unencumbered and liable to execution, exceed its debts, claims and liabilities of every nature whatsoever by more than the sum of seven hundred and fifty thousand dollars, and that the attached statement of said Company's assets and liabilities, signed by deponent, is true and correct.

(Signed)

WARD E. FLAXINGTON.

Subscribed, sworn to and Acknowledged before me on the date above written.

(Signed) HARRY GORDON,

[SEAL.] *Notary Public, Kings County, No. 63.*

Certificate filed in New York County No. 162.

Commission expires March 30, 1920.

214 [Endorsed:] Supreme Court of the United States. International Bridge Company, Plaintiff in Error, vs. People of the State of New York, Defendant in Error. (Certified Copy) Bond. Recorded and filed, Albany County Clerk's Office on the 12th day of June, 1918, at 10:00 A. M., in Book of Bonds No. 12, at page 497. L. C. Warner, Clerk.

215

No. 6.

In the Supreme Court of the United States.

INTERNATIONAL BRIDGE COMPANY, Plaintiff in Error,

against

PEOPLE OF THE STATE OF NEW YORK, Defendant in Error.

On reading the petition of International Bridge Company for writ of error and the assignment of errors, and upon due consideration of the record of said cause;

It Is Ordered, That a writ of error be allowed from the Supreme Court of the United States to the Supreme Court of the State of New York, as prayed for in said petition, and that said writ of error and citation thereon be issued, served and returned to the Supreme Court of the United States, in accordance with law, upon condition that the said International Bridge Company, petitioner and plaintiff in error, give security in the sum of Three Thousand (\$3,000.00) Dollars; that the said plaintiff in error shall prosecute said writ of error to effect, and, if said plaintiff in error fail to make his plea good, shall answer to the defendant in error for all costs and damages that may be adjudged or decreed on account of said writ of error.

And the said plaintiff in error now presenting a bond in the sum of Three Thousand (\$3,000.00) Dollars, with The Guarantee Com-

pany of North America, as surety, it is ordered that the same be and hereby is duly approved.

In Witness Whereof, I have hereunto set my hand this 11th day of June, 1918.

FRANK H. HISCOCK,
*Chief Judge of the Court of Appeals of
the State of New York.*

216 To the Hon. Frank S. Hiscock, Judge of the Court of Appeals.

And now comes the appellant, International Bridge Company, and represents that on the 12th day of March, 1918, final judgment was duly rendered by the Court of Appeals, affirming the judgment of affirmance entered in Albany County Clerk's office on the 2nd day of August, 1917, on an order of the Appellate Division of the Supreme Court, Third Department, entered on the 7th day of July, 1917, which affirmed the judgment of the Supreme Court, Albany County entered in Albany County Clerk's office on the 20th day of November, 1916, in favor of the plaintiff, in a suit at law, wherein the People of the State of New York were plaintiff and International Bridge Company was defendant, and awarding costs in favor of plaintiff.

That the Court of Appeals, having adjudged as aforesaid, remitted the record in said cause to the Supreme Court of the State of New York, Albany County, according to the form of the statute in such case made and provided, to be enforced according to law and which record now remains in the said Supreme Court.

That by an order of the Supreme Court, entered on the 23rd day of March, 1918, in Albany County Clerk's Office, said judgment of the Court of Appeals was made the judgment of the Supreme Court, and judgment of affirmance was entered on said remittitur in Albany County Clerk's office on said same day.

That this is an action brought by the People of the State of New York, to recover \$500.00 penalties accruing between January 1st and January 10, 1916, with interest thereon, because of the failure of the appellant, International Bridge Company, to comply with an act of the Legislature of the State of New York, known and designated

as Chap. 666 of the Laws of 1915, and entitled, "An Act to amend Chap. 753 of the Laws of 1857, entitled, 'An Act to incorporate the International Bridge Company,' in relation to the construction of a roadway and pathway and tolls for using the same" which act required the appellant, International Bridge Company to construct before January 1, 1916, a roadway for vehicles and a pathway for pedestrians upon the Black Rock Harbor draw of its bridge across the Niagara River between the City of Buffalo, N. Y. and Canada, and which fixed the maximum tolls to be charged by appellant for the use of said footpath and roadway and imposed a penalty of \$50.00 per day in case of appellant's failure to complete said bridge on or before said 1st day of January, 1916, for each day that appellant should be in default.

And your petitioner avers that in its answer it expressly charged that said Act of the Legislature of New York, to wit: Chap. 666 of the Laws of 1915 was unconstitutional and impaired the obligation of contracts, to wit: the franchises granted to your petitioner by the Legislature of the State of New York and by the Parliament of Canada in the acts of its incorporation, and attempted to impose upon your petitioner burdens not imposed as conditions of said franchises, when the same were granted, to wit: the obligation to maintain a footpath and roadway across the Black Rock Harbor draw of its bridge, and to maintain a bridge and give a passageway from the City of Buffalo to Squaw Island, and contravened Article I, Sec. 10, Subdivision 1 of the Constitution of the United States, and deprived your petitioner of its property without due process of law, and contravened the first section of the 14th Amendment to the Constitution of the United States.

And your petitioner, in its answer, expressly charged that said act of the Legislature of New York was unconstitutional and deprived your petitioner of its property without due process of law because the tolls fixed by the said act for the use of said roadway and pathway are so low and inadequate as to be confiscatory, and said act provides that no charge shall be made for the use thereof in certain instances and that said act contravened the first section of the 14th Amendment to the Constitution of the United States.

And your petitioner in its said answer expressly charged that said Act of the Legislature of New York was unconstitutional because it interfered with, regulated and burdened interstate and foreign commerce and contravened Article I, Sec. 8, Subdivision 3 of the Constitution of the United States, commonly known as the "Commerce Clause" and Acts of Congress passed under and by virtue of the power conferred upon Congress by the Constitution of the United States to regulate commerce with foreign nations and among the several states, in particular the act passed by Congress on June 30, 1870, entitled Chap. 176 of the Acts of 1870, authorizing your petitioner to construct and maintain a bridge across the Niagara River from the City of Buffalo to Canada, and the act passed by Congress on June 23, 1874, entitled Chap. 475 of the Acts of 1874 approving the modifications in the plans of said bridge and declaring said bridge as constructed to be a lawful structure; and the Act of Congress known as the Rivers & Harbors Act, approved June 13, 1902, and the Act of Congress known as the Rivers & Harbors Act, approved March 3, 1905, providing for the improvement of Black Rock Harbor by the United States, and Acts of Congress of subsequent years making further appropriations for such improvement of Black Rock Harbor, to wit: the Congressional Sundry Appropriations Act of 1906, being Chap. 3914 of the Acts of 1906; the Rivers & Harbors Act of 1907, being Chap. 2509 of the Acts of 1907; the Congressional Sundry Appropriations Act of 1907, being Chap. 2918 of the Acts of 1907; the Rivers & Harbors Act of 1909, being Chap. 264 of the Acts of 1909, and the Rivers & Harbors Act of 1910, being Chap. 382 of the Acts of 1910, and the general act relating to bridges over navigable rivers, to wit: Section 9 of the Rivers &

Harbors Act, Approved March 3, 1899, being Chap. 425 of the Acts of 1899.

219 That in said suit, and at the trial thereof, your petitioner claimed the right, title, privilege and immunity under said Act of Congress above specified, and under Section 9 of the Act of Congress approved March 3, 1899, entitled Chap. 425 of the Acts of 1899, to maintain its bridge as constructed and approved by Congress and by the Secretary of War, as an instrumentality of interstate and foreign commerce exclusively, without altering the same as required by said Act of the Legislature of New York, to wit: Chap. 666 of the New York Laws of 1915. That notwithstanding these facts, the Court of Appeals decided against the title, right, privilege and immunity thus specially set up and claimed by your petitioner and your petitioner shows that said judgment and decision and interpretation of said Acts of Congress were and are repugnant to the said Constitution and laws of the United States.

That in said suit and upon the hearing of said appeal in the Court of Appeals of the State of New York, your petitioner claimed the right, title, privilege and immunity under treaty between the United States and Great Britain concerning Boundary Waters between the United States and Canada, proclaimed May 13, 1910, to maintain its bridge as constructed and approved by Congress and by the Secretary of War across the Niagara River at Black Rock Harbor, which are boundary waters between the United States and Canada governed by said treaty without altering the same as required by said Act of the Legislature of New York, to wit: Chapter 666 of the New York Laws of 1915; that notwithstanding these facts the Court of Appeals decided against the title, right, privilege and immunity thus specially set up and claimed by your petitioner and your petitioner shows that said judgment and decision were and are repugnant to said treaty and to the constitution and laws of the United States.

220 And your petitioner further avers that in the aforesaid judgment and proceeding certain errors were committed to the prejudice of your petitioner, all of which will more fully appear from the assignment of errors which is filed herewith.

Wherefore, your petitioner prays that a writ of error from the Supreme Court of the United States may issue in this case to the Supreme Court of the State of New York which has the custody of the record in this case for the correction of errors so complained of and that a transcript of the record and proceedings and papers in this cause, duly authenticated by the Clerk of said Supreme Court to wit: the County Clerk of Albany County, may be sent to the Supreme Court of the United States as provided by law.

Dated June 8th, 1918.

INTERNATIONAL BRIDGE COMPANY.
By HENRY W. SPRAGUE, *Director*.

MOOT, SPRAGUE, BROWNELL & MARCY,
Attorneys for Petitioner & Plaintiff in Error.

Office & P. O. Address, 302 Erie County Bank Bldg., Buffalo, N. Y.

221 STATE OF NEW YORK,
County of Erie,
City of Buffalo, ss:

Henry W. Sprague, being duly sworn, says that he is an officer, to wit: a Director of the International Bridge Company, plaintiff in error and petitioner herein, and deponent is also a member of the firm of Moot, Sprague, Brownell & Marcy, attorneys for said petitioner; that deponent has read the foregoing petition and the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true;

That the reason why this verification is made by deponent and not by said petitioner, is that none of the officers of said petitioner, International Bridge Company, are within the County of Erie, where their said attorneys reside and have their office, with the exception of deponent.

That all of the material allegations of said petitioner are within the personal knowledge of deponent.

HENRY W. SPRAGUE.

Subscribed and sworn to before me this 8th day of June, 1918.

FRANCES SCHEFFER,

Notary Public in and for Erie Co., New York.

222 [Endorsed:] B-153. P-111. Supreme Court of the United States. International Bridge Company, Plaintiff in Error, vs. People of the State of New York, Defendant in Error. Original Petition & Order. Moot, Sprague, Brownell & Marcy, Attorneys for Pltf. in Error. Office and P. O. Address 302 Erie County Savings Bank Building, Buffalo, N. Y. Albany County, N. Y. Filed Jun-12, 1918. Clerk's Office.

223 No. 7.

In the Supreme Court of the United States.

INTERNATIONAL BRIDGE COMPANY, Plaintiff in Error,

against

PEOPLE OF THE STATE OF NEW YORK, Defendant in Error.

Error to the Supreme Court of the State of New York.

And now comes International Bridge Company, Petitioner and Plaintiff in Error, by Moot, Sprague, Brownell & Marcy, its attorneys, and in connection with its petition for a writ of error shows that in the record and proceedings and in the rendering of the judgment and decision of the Court of Appeals of the State of New York in the above entitled cause manifest error has intervened to the prejudice of this petitioner and plaintiff in error in this, to-wit:

First: The court erred in holding that the Act of the Legislature of the State of New York, to-wit: Chapter 666 of the Laws of 1913, entitled "An Act to amend Chapter 753 of the Laws of 1857, entitled 'An Act to incorporate the International Bridge Company' in relation to the construction of a roadway and pathway and tolls for using the same" was constitutional and did not impair the obligation of contracts, to wit: the franchises granted to your petitioner by the Legislature of the State of New York and by the Parliament of Canada in the acts of its incorporation, and did not contravene Article I, Section 10, Subdivision 1 of the Constitution of the United States, and did not deprive your petitioner of its property without due process of law and did not contravene the first section of the

14th Amendment to the Constitution of the United States.
 224 Second: The Court erred in holding that said Act of the Legislature of New York was constitutional, and did not deprive your petitioner of its property without due process of law, and was not confiscatory by reason of the tolls fixed in and by said act for the use of said roadway and pathway, and the provision that a charge should be made for the use thereof in certain instances, and did not contravene the first section of the 14th Amendment to the Constitution of the United States.

Third: The Court erred in holding that the assets of your petitioner, devoted wholly to interstate and foreign commerce and to furnishing an instrumentality therefor, and its earnings derived wholly from such interstate and foreign commerce and from furnishing an instrumentality therefor, might be considered in determining whether the tolls fixed by said act for intrastate commerce, and for the use of an instrumentality for such commerce, were confiscatory.

Fourth: The said Court of Appeals erred in holding that said Act of the Legislature of New York was constitutional, and did not contravene Article I, Section 8, Subdivision 3 of the Constitution of the United States, and Acts of Congress passed under and by virtue of the power conferred on Congress by the Constitution of the United States to regulate commerce with foreign nations and among the several states, in particular the act passed by Congress on June 23, 1870, entitled Chap. 176 of the Acts of 1870, authorizing your petitioner to construct and maintain a bridge across the Niagara River from the City of Buffalo to Canada, and the act passed by Congress on June 23, 1874, entitled Chap. 475 of the Acts of 1874, approving the modifications in the plans of said bridge and declaring said bridge as constructed to be a lawful structure; and the Act of Congress known as the Rivers & Harbors Act, approved June 13, 1906, and the Act of Congress known as the Rivers & Harbors Act, approved March 3, 1905, providing for the improvement of Black

225 Rock Harbor by the United States, and Acts of Congress subsequent years making further appropriations for such improvement of Black Rock Harbor, to wit: the Congressional Sundry Appropriations Act of 1906, being Chap. 3914 of the Acts of 1906; the Rivers & Harbors Act of 1907, being Chap. 2509 of the Acts of 1907; the Congressional Sundry Appropriations Act of 1907, being Chap. 2918 of the Acts of 1907; the Rivers & Harbors

Act of 1909, being Chap. 264 of the Acts of 1909, the Rivers & Harbors Act of 1910, being Chap. 382 of the Acts of 1910; and the general act relating to bridges over navigable waters, to wit: Section 9 of the Rivers & Harbors Act, approved March 3, 1899, being Chap. 425 of the Act of 1899.

Fifth: The said Court of Appeals erred in holding that said Act of the Legislature of New York was constitutional and did not contravene the treaty entered into by and between the United States and Great Britain concerning Boundary Waters between the United States and Canada proclaimed May 13, 1910, assuming jurisdiction over and regulating navigation upon said boundary waters, including the Niagara River and all arms thereof.

Sixth: The said Court of Appeals erred in rendering decision against the title, right, privilege and immunity set up and claimed by plaintiff in error under the said Acts of Congress hereinabove specified in the fourth assignment of error herein, to maintain and operate its bridge as authorized, constructed and approved by Congress and by the Secretary of War, as an instrumentality of interstate and foreign commerce, viz: a railroad bridge from Buffalo to Canada, and in holding that the Legislature of the State of New York, by said Chap. 666 of the Laws of 1915, might compel the plaintiff in error to alter its bridge by constructing a roadway and pathway on the Black Rock Harbor draw thereof, and might compel the plaintiff in error to maintain and operate its said bridge 226 as a bridge for pedestrians and vehicles between the City of Buffalo and Squaw Island in the State of New York.

Seventh: The said Court of Appeals erred in rendering decision against the title, right, privilege and immunity set up and claimed by plaintiff in error under said treaty between the United States and Great Britain concerning Boundary Waters between the United States and Canada proclaimed May 13, 1910, to maintain and operate its bridge as authorized, constructed and approved by Congress without interference from the Legislature of the State of New York.

By reason whereof this petitioner and plaintiff in error prays that the said judgment of the Court of Appeals, thereafter remitted to and made the judgment of the Supreme Court of the State of New York, may be reversed and the complaint of the defendant in error dismissed.

Dated Buffalo, N. Y., the 8th day of June, 1918.

MOOT, SPRAGUE, BROWNELL & MARCY,

Attorneys for Petitioner and Plaintiff in Error.

227 [Endorsed:] Supreme Court of the U. S. International Bridge Co., Pltf. in Error, vs. People of the State of New York, Deft. in Error. Original Assignment of Errors. Moot, Sprague, Brownell & Marcy attorneys for Pltf. in Error. Office and P. O. Address 302 Erie County Savings Bank Building Buffalo, N. Y. Filed Jun- 12, 1918, Clerks Office, Albany County, N. Y.

228

No. 8.

Citation.

UNITED STATES OF AMERICA, ss:

To the People of the State of New York, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington, D. C., within thirty days from the date of the service of this citation, pursuant to writ of error filed in the Clerk's office of the Supreme Court of the State of New York, wherein International Bridge Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf

Witness the hand and seal of the Honorable, the Chief Judge of the Court of Appeals this 11th day of June, in the year of our Lord One thousand nine hundred and eighteen.

FRANK H. HISCOCK,
Chief Judge of the Court of Appeals.

Attest:

W. S. DOOLITTLE,
*Clerk of the District Court of the United States
for the Northern District of New York.*

229 [Endorsed:] Supreme Court of the U. S. International Bridge Co., Pltf. in Error, vs. People of the State of New York, Deft. in Error. Original Citation. Moot, Sprague, Brown & Marcy, Attorneys for Pltf. in Error. Office and P. O. Address 302 Erie County Savings Bank Building, Buffalo, N. Y. Albany County, N. Y., Clerk's Office. Filed June 12, 1918.

230

No. 9.

At a Special Term of the Supreme Court, Held in and for the County of Albany, at the Court-house, in the City of Albany, N. Y., the 23rd Day of March, 1918.

Present: Hon. William P. Rudd, Justice.

PEOPLE OF THE STATE OF NEW YORK, Plaintiff,

vs.

INTERNATIONAL BRIDGE COMPANY, Defendant.

The above named defendant having appealed to the Court of Appeals from a judgment entered upon order of the Appellate Division

of the Supreme Court, in and for the Third Judicial Department, entered herein on August 2nd, 1917, in the office of the Clerk of the County of Albany, whereby a judgment of this court in favor of the plaintiffs and against the defendants for the sum of \$744.42, entered November 20th, 1916, was in all respects affirmed with costs taxed at the sum of \$163; and the said appeal having been duly argued in the Court of Appeals and after due deliberation the Court of Appeals having ordered and adjudged that the judgment so appealed from be affirmed with costs, and having further ordered that the proceedings therein be remitted to the Supreme Court there to be proceeded upon according to law,

Now, on reading and filing the remittitur from the Court of Appeals herein, and upon motion of Merton E. Lewis, Attorney-General, attorney for plaintiffs, it is

231 Ordered, that the order and judgment of the Court of Appeals be and the same are hereby made the order and judgment of this court.

Enter.

WM. P. RUDD, J. S. C.

232 [Endorsed:] B. 152. P. 396. Supreme Court Albany County. People of the State of New York, Plaintiffs, vs. International Bridge Company, Defendant. Original. Order for Judgment on Remittitur. Merton E. Lewis, Attorney-General, Attorney for ———, Capitol, Albany, N. Y.

233 No. 10.

Supreme Court, Albany County.

PEOPLE OF THE STATE OF NEW YORK, Plaintiffs,

vs.

INTERNATIONAL BRIDGE COMPANY, Defendant.

The issues in this action having been regularly brought on for trial at a trial term of this court held on the 20th day of June, 1916, and having been determined in favor of the plaintiffs, and a decision having been filed on the 18th day of November, 1916 directing judgment for the plaintiff, and judgment having been entered thereon for \$744.42 on November 20th, 1916, and the defendant having appealed to the Appellate Division of the Supreme Court for the Third Judicial Department from said judgment and said Appellate Division having affirmed said judgment and made an order of affirmance with costs at the term commencing May 1st, 1917 and a judgment of affirmance having been entered upon said order in the office of the Clerk of Albany County on August 2nd, 1917, which judgment also awarded to the plaintiffs against the defendants costs taxed at \$163.00 and the defendants having appealed therefrom to the Court of Appeals, and the said Court of Appeals having sent hither its remittitur filed herein this day, by which it appears that the said Court of Appeals has affirmed the said judgment in all

things with costs and has given judgment accordingly, and has remitted the judgment of said Court of Appeals to this court to be enforced according to law; and this court having, by an order duly entered herein this day, ordered that said judgment be made

234 the judgment of this court and the plaintiffs' costs having been duly taxed at the sum of \$176.00 as per bill of costs filed with the Clerk of this court on this day,

Now, on motion of Merton E. Lewis, Attorney-General, attorney for plaintiff, it is

Ordered, adjudged and decreed that the said order and judgment of the Court of Appeals be and the same hereby are made the order and judgment of this court and it is further

Ordered, adjudged and decreed that the respondents herein recover from the relator their costs of \$176.00 as per the bill of costs filed with the clerk of this court on this day.

Judgment this 23rd day of March, 1918.

L. C. WARNER, *Clerk*.

235 [Endorsed:] B. 109. P. 84. Supreme Court, Albany County. People of the State of New York, Plaintiffs, vs. International Bridge Company, Defendant. Original. Judgment on Remittitur of Court of Appeals. Merton E. Lewis, Attorney-General, Attorney for ———, Capitol, Albany, N. Y.

236

No. 11.

Supreme Court of the United States.

INTERNATIONAL BRIDGE COMPANY, Plaintiff-in-Error,
against

PEOPLE OF THE STATE OF NEW YORK, Defendant-in-Error.

The plaintiff in error, International Bridge Company, on the 12th day of June, 1918, filed with the undersigned, Luther C. Warner as Clerk of the Supreme Court of Albany County, in the above entitled action, the following documents:

1st. The original order, dated June 11th, 1912, signed by Hon. Frank S. Hiscock, Chief Judge of the Court of Appeals of the State of New York, allowing writ of error herein from the Supreme Court of the United States to the Supreme Court of the State of New York together with original petition and assignment of errors upon which said order was granted.

2nd. The original bond, approved by Hon. Frank S. Hiscock, Chief Judge of the Court of Appeals of the State of New York on the 11th day of June, 1912, given as security for the prosecution of the writ of error in the United States Supreme Court.

3rd. The original writ of error issued by W. S. Doolittle, Clerk of the District Court of the United States for the Northern District of New York on the 11th day of June, 1912, and said plaintiff in error thereafter filed with the undersigned one copy of said writ of error for the files of my office.

4th. Original citation, dated the 11th day of June, 1918, addressed to the people of the State of New York, defendant in error, signed by Hon. Frank S. Hiscock, Chief Judge of the Court of Appeals of the State of New York, and attested by W. S. Doolittle, Clerk of the District Court of the United States for the Northern District of New York.

In witness whereof, I have hereunto set my hand and affixed the official seal of the Supreme Court, at my office in the City of Albany, State of New York, this 26th day of June, 1918.

[Seal Albany County July, 1847.]

L. C. WARNER,
*County Clerk of Albany County and Clerk of
the Supreme Court in and for Said County.*

238

No. 12.

STATE OF NEW YORK,
Supreme Court, Albany County, ss:

I, Luther C. Warner, County Clerk of Albany County, also Clerk of the Supreme and County Courts, the same being Courts of Record held therein, do hereby certify that the foregoing volume and the present volume constitute a true, full and complete transcript of the record and proceedings consisting of two volumes, including this present volume, to wit:

Volume 1, entitled "Record on Appeal", containing pages 1 to 194 inclusive, exclusive of this present page in a certain cause, entitled in this Court—"People of the State of New York, vs. International Bridge Company" and also the opinion of the Court of Appeals, rendered in said cause, as the same now appears on file in my office.

Volume 2, entitled "Exhibits", containing 4 blue prints of plans, maps, etc., without paging.

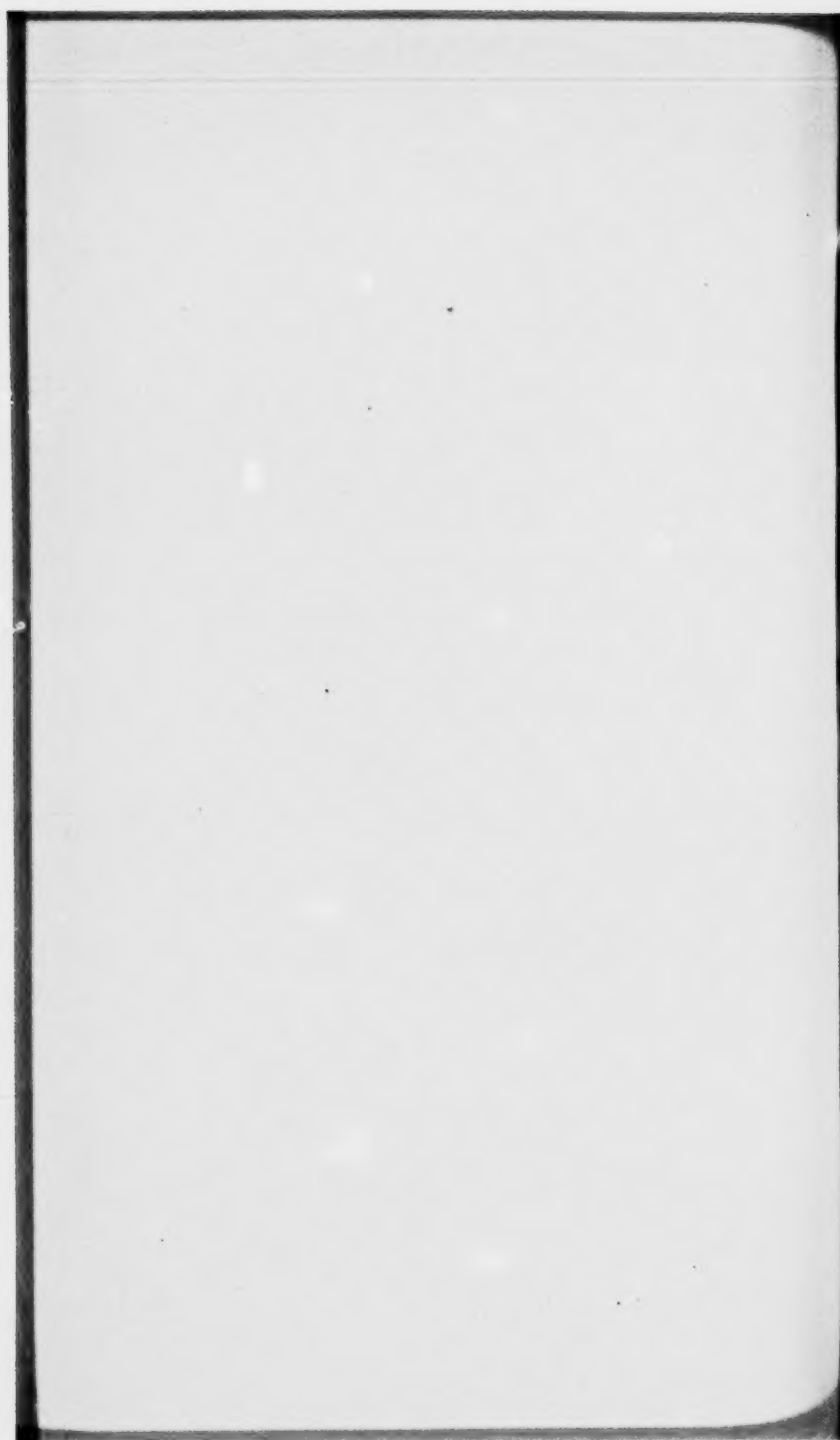
The original writ of error, copy of bond, order allowing writ of error, petition and assignment of errors and citation are returned with the transcript of the record. Also order for judgment on remittitur and judgment on remittitur of Court of Appeals.

In testimony whereof, I have hereunto set my hand and affixed the official seal of the said County and Courts, at Albany, in said State, this 26th day of June, 1918.

[Seal Albany County, July, 1847.]

L. C. WARNER,
*Clerk of the County of Albany and Clerk of the
Supreme Court of the State of New York in
and for the County of Albany.*

Endorsed on cover: File No. 26,646. New York Supreme Court. Term No. 560. International Bridge Company, Plaintiff in Error, vs. The People of the State of New York. Filed July 15th, 1918. File No. 26,646.



OCT 18 1913

JAMES D. MAHER;
CLERK.

Supreme Court of the United States

No.

46

INTERNATIONAL BRIDGE COMPANY

Plaintiff in error

against

THE PEOPLE OF THE STATE OF NEW YORK

MOTION TO ADVANCE

CHARLES D. NEWTON

Attorney-General of New York

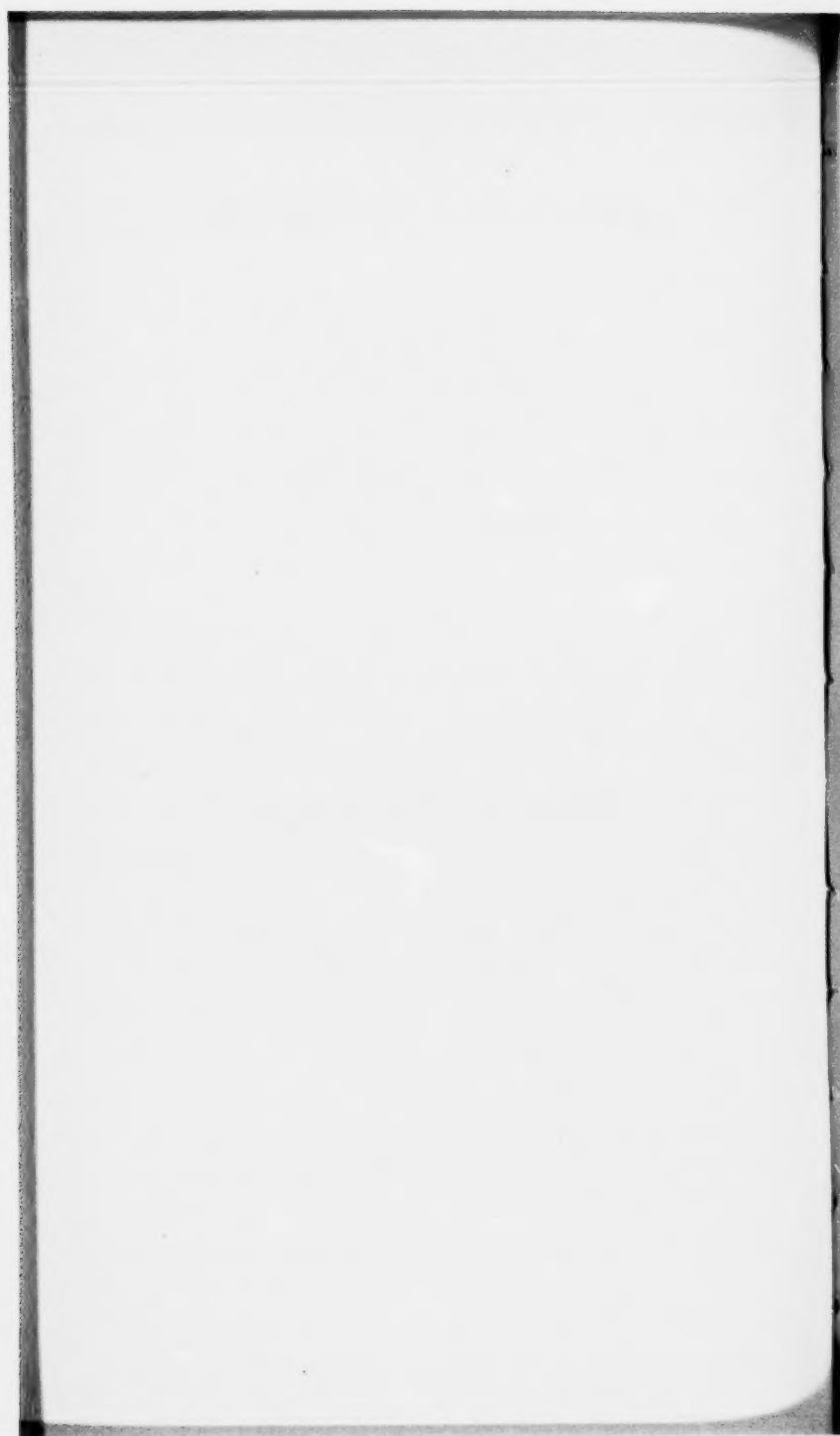
Attorney for Defendant in error

E. C. AIKEN

Of Counsel

MOOT, SPRAGUE, BROWNELL & MARCY

Attorneys for Plaintiff in error



SUPREME COURT OF THE UNITED STATES

INTERNATIONAL BRIDGE COMPANY,

Plaintiff in Error,

against

THE PEOPLE OF THE STATE OF NEW

YORK,

Defendants in Error.

To the Honorable Justices of this Court:

Now come the defendants in error herein, the People of the State of New York, and respectfully show:

This is a case in which a state is a party, and within the scope of revised statutes, section 949. There is reason why the cause should be advanced upon the calendar, as follows:

By chapter 666 of the Laws of 1915 of the State of New York, the charter of the International Bridge Company was amended by the addition of a section requiring the company to place a roadway and footpath upon part of its bridge, then used exclusively for railroad purposes. This addition was to be completed by January 1, 1916, upon pain of a penalty of fifty dollars a day for default thereafter. The Bridge Company challenged the constitutionality of the act, and after

ten days default, the attorney-general of the state brought this action for five hundred dollars penalties. The constitutionality of the statute was upheld in this action in Trial Term of the Supreme Court of New York, and the decision was unanimously affirmed by the Appellate Division and by the Court of Appeals. The defendant brought the case to this court on writ of error, in July 1918.

It is important to the state to have a prompt decision in this case, as the necessity for the roadway and footpath upon the bridge which caused the passage of the statute, is ever pressing. The resumption of peaceful activities since the close of hostilities and the return of the soldiers makes it now much more pressing than it was a year ago.

From the point of view of the plaintiff in error, a prompt decision is highly important, as penalties at the rate of fifty dollars a day (if the statute be constitutional) are accruing against it continuously.

Wherefore, the defendants in error move the advancement of this case upon the calendar and request that the Court set a day upon which argument will be heard.

CHALES D. NEWTON,
Attorney-General of New York,
Attorney for Defendants in Error.

Albany, N. Y., October 6, 1919.

The plaintiff in error joins in the foregoing application.

MOOT, SPRAGUE, BROWNELL & MARCY,
Attorneys for Plaintiff in Error.

Office Supreme Court, U. S.
FILED

NOV 10 1919

JAMES D. MAHER,
CLERK.

Supreme Court of the United States

OCTOBER TERM, 1919.

No. [REDACTED] 46

INTERNATIONAL BRIDGE COMPANY

PLAINTIFF IN ERROR,

vs.

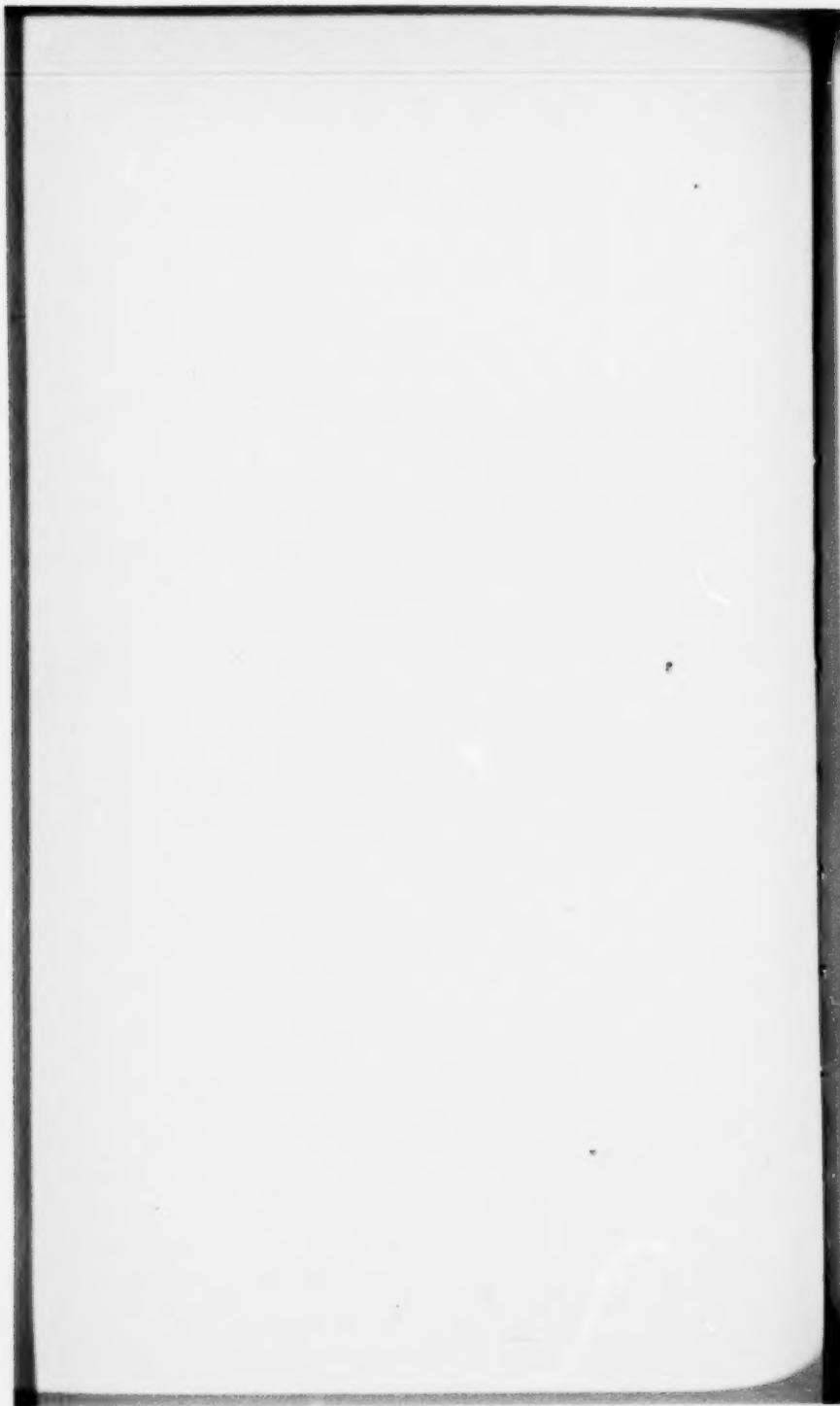
THE PEOPLE OF THE STATE OF
NEW YORK,

DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR

MOOT, SPRAGUE, BROWNELL & MARCY,
Attorneys for Petitioner.

ADELBERT MOOT,
Of Counsel.



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SUPREME COURT OF THE UNITED STATES

INTERNATIONAL BRIDGE COM-
PANY,

Plaintiff in Error,

AGAINST

PEOPLE OF THE STATE OF NEW
YORK,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT:

Writ of error to the Supreme Court of the State of New York to review a judgment entered in Albany County Clerk's office on the 23rd day of March, 1918, on remittitur from the Court of Appeals, affirming the judgment of affirmance entered in Albany County Clerk's office August 2nd, 1917, on an order of the Appellate Division, Third Department, affirming with costs a judgment of the Supreme Court entered in said Clerk's office November 20, 1916, in favor of plaintiff, People of the State of New York, and against defendant, International Bridge Company, for \$744.42 (R. pp. 204-208, also 215-216). The judgment of the trial court was entered upon the decision of Mr.

Justice Rudd, a jury trial being waived (R. pp. 68, 69). No opinion was written by the trial court, nor in the Appellate Division. The opinion of the Court of Appeals is printed at pp. 197-202 of the record and is reported at 223 N. Y. 137. The assignments of error attack the constitutionality of Chap. 666 of the New York Laws of 1915, in that the judgment rendered is for a penalty of \$50.00 per day for not complying with said statute, and building an addition to the International Bridge over the Niagara River between Buffalo and Canada, when defendant had already built said Bridge as authorized by Chap. 176, Acts of Congress for 1870, and the same had thereafter been approved of as built by Chap. 474, Acts of Congress for 1874, and by subsequent Acts of Congress, and Acts of the Secretary of War thereunder (R. pp. 211-213).

PLEADINGS:

The action was brought by the Attorney General of the State of New York to recover penalties aggregating \$500.00, accruing from January 1st to January 10, 1916, at the rate of \$50.00 per day, because of plaintiff in error's non-compliance with Chapter 666 of the New York Laws of 1915, purporting to amend its charter by requiring it to construct a roadway for vehicles, and a pathway for pedestrians, upon the draw across Black Rock Harbor of the bridge of the defendant across the Niagara River between Buffalo and the Dominion of Canada, so as to give a passageway over said draw between Squaw Island and the mainland of

New York State, said roadway and pathway to be completed and ready for use by January 1, 1916 (pp. 6 to 12).

The answer admits the facts set up in the complaint, alleges certain other facts which will be commented upon later, admits non-compliance with the statute, but denies that defendant became liable to penalties because of said non-compliance, and sets up three affirmative defenses:

(1) That the Statute is unconstitutional because it impairs the obligation of contracts, to wit: the franchises granted defendant by the Legislature of the State of New York, and by the Parliament of Canada, and imposes additional burdens upon defendant not imposed as conditions of said franchises when granted, and deprives defendant of its property without due process of law.

(2) That the Statute is unconstitutional because the tolls fixed thereby, for the use of said roadway and pathway, are so low and inadequate that the same will not yield defendant a fair return upon the investment it is required to make, and will be confiscatory, and because the act provides that no charge shall be made for the use of the roadway for empty wagons and automobile trucks used for commercial purposes, or for the drivers thereof.

(3) That the Statute is unconstitutional because it is an interference with the exclusive jurisdiction conferred upon and exercised by Congress in the premises under the Commerce Clause of the Constitution (pp. 12-25).

HISTORICAL STATEMENT:

The International Bridge Company was created by a special Act of the Legislature of the State of New York in 1857 (New York Laws of 1857, Chap. 753. Ex. 1, p. 70, fol. 271). In the same year a similar corporation of the same name was created by an act of the Dominion of Canada (Chapter 227, 20th Victoria, Ex. 2, p. 70, fol. 271-2). In 1869 an act was passed by the New York Legislature authorizing the consolidation of the New York corporation and the Canadian corporation into a single corporation, possessing all the rights, privileges and franchises and subject to all the disabilities and duties of each of such corporations (New York Laws 1869, Chap. 550, Sec. 6; Ex. 3; pp. 70 and 71, fols. 272, 273). A similar act was passed by the Canadian Parliament about the same time (Chapter 65, 32nd and 33rd Victoria, Ex. 4; p. 71, fol. 273), and the consolidation authorized by said acts was perfected shortly thereafter (Finding I, pp. 51, 52).

The original act of incorporation of the State of New York (Laws of 1857, Chap. 753) created a corporation (Sec. 1):

“* * * for the construction, maintaining and managing a bridge across the Niagara River from the City of Buffalo to some point near Fort Erie, Canada * * * said bridge to be constructed with two draws, one across the Black Rock Harbor and the other across the main channel of the River.”

* * * * *

"Sec. 15. Said bridge may be constructed as well for the passage of persons on foot and in carriages and otherwise as for the passage of railroad trains."

"Sec. 16. Whenever the said bridge shall be complete for the passage of ordinary teams and carriages the said company may erect toll gates, fix rates of toll and make such erections * * * to guard the entrance on said bridge, but no greater toll than the following shall be charged, viz: For every foot passenger entering upon or passing over said bridge, twenty-five cents; for every horse and rider, fifty cents; for every horse and single carriage, sixty cents; * * * for each double carriage and two horses, one dollar * * * for sheep passing one and one-half cents per head; for swine, two cents each; for meat cattle, six cents per head; for each horse in droves or in cars twelve and one-half cents."

"Sec. 17. Whenever said bridge is so complete as to admit of the passage of railroad trains, the said company may erect such gates and fixtures * * * and may make such * * * rules and regulations * * * in relation to the use of such bridge * * * by railroad companies * * * and the compensation to be paid therefor as said directors may think proper but no distinction shall be made * * * in favor of or against any one or more railroad companies * * *."

The Canadian Charter (Caption 227, 20th Victoria) created a corporation:

"for constructing, maintaining, working and managing a bridge across the Niagara River from some point at or near the Village of Waterloo (known as Fort Erie) in the said Township of Bertie to the City of Buffalo."

* * * * *

"Sec. XIII. The said bridge shall be constructed so as not materially to obstruct the navigation of the Niagara River. The said bridge shall have two draws, one across Black Rock Harbor and the other across the main channel of the river, which said draws shall be of ample width to give free and unobstructed passage to all steamboats and other vessels navigating the said river * * *"

"Sec. XIV. The said bridge shall be as well for the passage of persons on foot and in carriages and otherwise as for the passage of railway trains and such railway companies as are hereinafter mentioned or referred to shall have and be entitled to the same and equal rights and privileges in the passage of the said bridge and in the use of the machinery and fixtures thereof, and of all the approaches thereto."

* * * * *

"Sec. XVI. Whenever the said bridge is so completed as to admit of the passage of railway trains, the said company may erect such gates and fixtures to guard the entrance of

such trains upon the bridge as the said directors may deem proper and may make such by-laws, rules and regulations not inconsistent with the provisions of this act in relation to the use of the said bridge, its machinery, appurtenances, and approaches by railway companies, their trains and carriages, as the directors may think proper, but no discrimination shall be made by the said directors in favor of or against any one or more railway companies in relation to the approaches or the passage of the said bridge or the use of its machinery."

Said act authorizing consolidation (New York Laws of 1869, Chapter 550), also provided among other things as follows:

"Sec. 11. The said new corporation shall have power from time to time to borrow such sums of money as may be necessary for constructing and completing its bridge and for the acquiring of the necessary real estate for the site thereof and approaches thereto; and to mortgage its corporate property and franchises to secure the payment of any debt which shall be contracted by such corporation for the purposes aforesaid." (Exhibit 3, pp. 70-1, fols. 272, 273.)

In 1870, and prior to the erection of the bridge, the Congress of the United States passed an act authorizing the construction of this bridge, which we here insert in full because of its importance in this litigation:

Act of Congress June 30, 1870.

Chap. CLXXVI. An Act to Authorize the Construction and Maintenance of a Bridge Across the Niagara River.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any bridge and its appurtenances which shall be constructed across the Niagara river, from the city of Buffalo, New York, to Canada, in pursuance of the provisions of an act of the legislature of the State of New York, entitled "An act to incorporate the International Bridge Company", passed April the seventeenth, one thousand eight hundred and fifty-seven, or of any act or acts of said legislature now in force, amending the same, shall be lawful structures, and shall be so held and taken, and are hereby authorized to be constructed and maintained as provided by said act and such amendments thereto, anything in any law or laws of the United States to the contrary notwithstanding; and such bridge shall be, and is hereby, declared to be an established post-road for the mails of the United States; but this act shall not be construed to authorize the construction of any bridge which shall not permit the free navigation of said river to substantially the same extent as would be enjoyed under the provisions of said act and the amendments thereto, heretofore enacted and now in force; *Provided, nevertheless,* that the location of any bridge, the construction of which is hereby authorized, shall be subject to the approval of the Secretary of War, but not to be located south of*

Squaw island; *And provided further*, that such bridge shall have at least two draws of not less than one hundred and sixty feet in width, in the clear between the piers, which shall be located at the points best calculated to accomodate the commerce of said river; and the piers of said bridge shall be parallel to the current of said river.

Sec. 2. *And be it further enacted*, that the bridge herein named shall be subject, in its construction, to the supervision of the Secretary of War of the United States, to whom the plans and specifications, relative to its construction, shall be submitted for approval. And all railway companies desiring to use the said bridge shall have and be entitled to equal rights and privileges in the passage of the same, and in the use of the machinery and fixtures thereof and of all the approaches thereto, under and upon such terms and conditions as shall be prescribed by the district court of the United States for the northern district of New York, upon hearing the allegations and proofs of the parties, in case they shall not agree.

Sec. 3. *And be it further enacted*, that the right to alter or amend this act so as to prevent or remove all material obstructions to the navigation of the said river, by the construction of the said bridge, is hereby expressly reserved.

Approved, June 30, 1870.

(Exhibit 5, p. 71, fol. 274.)

The bridge was constructed thereafter between 1870 and 1874, as a railroad bridge exclusively,

without any provision for footpaths or roadways (Decision, Finding VI, pp. 55, 56).

After the completion of the bridge Congress passed the following Act:

“That the modification in the plans of the bridge authorized by the Act approved on the 30th day of June, 1870, as stated in the report of the Board of Engineers of the War Department, dated February 7th, 1871, are hereby approved and said bridge, as constructed, is hereby declared to be a lawful structure and an established post route for the mail of the United States.” (Act of Congress, June 23, 1874, Chapter 475, Ex. 6, p. 71; Finding VII, p. 56.)

In 1915 the New York Legislature passed the following act:

CHAP. 666. Laws of 1915.

AN ACT to amend chapter seven hundred and fifty-three of the laws of eighteen hundred and fifty-seven, entitled “An act to incorporate the International Bridge Company”, in relation to the construction of a roadway and pathway and tolls for using the same.

Became a law May 22, 1915, with the approval of the Governor.

Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Chapter seven hundred and fifty-three of the laws of eighteen hundred and fifty-seven entitled "An act to incorporate the International Bridge Company", is hereby amended by adding thereto a new section after section fifteen, to be known as section fifteen-a, and to read as follows:

§ 15-a. A roadway for vehicles and a pathway for pedestrians shall be constructed upon the draw across Black Rock harbor giving a passageway over said draw between Squaw Island and the mainland of New York state, such roadway and footpath to be completed and ready for use by January first, nineteen hundred and sixteen, and in case of the failure of said corporation or its successor in interest so to complete the same on or before said date, said corporation or its successor in interest shall be liable to a penalty of fifty dollars per day for each day that it shall be in default. Such penalty may be sued for and collected by the attorney-general in any court of competent jurisdiction.

Upon the completion of said roadway and pathway, said company may erect toll gates and fix rates of toll for the use thereof, but no greater tolls than the following shall be charged for the use of the said roadway or pathway: for every foot passenger, three cents for each passenger one way or five cents for round trip; for every horse and rider, five cents; for every carriage, except as hereinafter expressly provided, with horse or

horses and occupants, ten cents; for every automobile, except as hereinafter expressly provided, and occupants, ten cents; for loaded wagons and loaded automobile trucks for commercial purposes, two cents for each ton of material carried, and no charge for empty wagons or automobile trucks used for commercial purposes, or for the drivers thereof.

§ 2. This act shall take effect immediately.
(Exhibit 29, p. 76, fol. 293.)

SPECIFICATION OF ERRORS:

1. The Court of Appeals erred in holding that the New York Act of 1915 does not impair the obligation of contracts, to wit: the franchises granted to the International Bridge Co. by the legislature of New York and the Parliament of Canada in the acts of its incorporation, and does not deprive plaintiff in error of its property without due process of law. (First Assignment of Error, p. 212.)

2. The Court of Appeals erred in holding that the provisions of the New York Act of 1915 in regard to tolls for the use of the roadway and pathway between the City of Buffalo and Squaw Island are not confiscatory, and do not deprive the Bridge Company of its property without due process of law. (Second Assignment of Error, p. 212.)

3. The Court of Appeals erred in holding that the assets of the Bridge Company, devoted wholly

to interstate and foreign commerce and furnishing an instrumentality therefor, and its earnings derived wholly from such commerce and furnishing an instrumentality therefor, might be considered in determining whether the tolls fixed by the New York Act of 1915, for intrastate commerce and for the use of an instrumentality for such commerce, were confiscatory. (Third Assignment of Error, p. 212.)

4. The Court of Appeals erred in holding that the New York Act of 1915 did not contravene the commerce clause of the Constitution and Acts of Congress passed thereunder, including both (a) acts specifically relating to the construction and operation of said bridge, and the improvement of Black Rock Harbor, and (b) the general act relating to bridges over navigable waters of the United States, to wit: Section 9 of the Rivers & Harbors Act of 1899 (Chap. 425 of the Acts of 1899). (Third Assignment of Error, p. 212; Sixth Assignment of Error, p. 213.)

5. The Court of Appeals erred in rendering decision against the right, title, privilege and immunity set up and claimed by the Bridge Company under said Acts of Congress and the treaty between the United States and Great Britain, concerning Boundary Waters between the United States and Canada, to maintain and operate its bridge as authorized, constructed and approved by Congress without interference from the Legislature of the State of New York. (Sixth Assignment of Error, p. 213; Seventh Assignment of Error, p. 213.)

6. The Court of Appeals erred in holding that the New York Act of 1915 did not contravene the treaty entered into by and between the United States and Great Britain concerning boundary waters between the United States and Canada, proclaimed May 13, 1910. (Fifth Assignment of Error, p. 213; Seventh Assignment of Error, p. 213.)

POINT I.

The Court of Appeals erred in holding that the Act of 1915 did not impair the obligation of contracts, to wit: the franchises granted to the International Bridge Company by the Legislature of New York and the Parliament of Canada in the acts of its incorporation, and did not deprive plaintiff in error of its property without due process of law.

This court will determine for itself the validity, nature and extent of the contracts between the plaintiff in error and the State of New York and Dominion of Canada, respectively.

“This court has always held that the competency of a state, through its legislation, to make an alleged contract, and the meaning and validity of such contract were matters which, in discharging its duty under the Federal Constitution it must determine for itself; and while the leaning is toward the interpretation placed by the State Court, such

leaning cannot relieve us from the duty of an independent judgment upon the question of contract or no contract."

Stearns v. Minnesota, 179 U. S. 223, 232, 233.

"The assignment of error on this ruling presents a question which this court is bound to decide for itself, independent of decisions of the state court. * * *

In every case like this, involving an inquiry as to whether a law is valid as an exertion of the police power, or void as impairing the obligation of a contract, the determination must depend on the nature of the contract and the right of government to make it."

Grand Trunk & Western Ry. v. South Bend, 227 U. S. 544.

Douglas v. Kentucky, 168 U. S. 488, 502.

Northern Pacific Ry. v. Duluth, 208 U. S. 583, 590.

Russell v. Sebastian, 233 U. S. 195, 202.

Detroit United Railway v. Michigan, 242 U. S. 238, 249.

How does Chap. 666 of the New York Laws of 1915 impair any contract obligation?

The New York Act of 1915 impairs the franchises of the International Bridge Company in three respects:

(A) It renders mandatory the building of a footway and roadway upon the International

Bridge which, under the original franchises conferred upon the Bridge Company by New York State and the Dominion of Canada, was not mandatory, but merely permissive and optional.

The New York Court of Appeals held in effect that the original New York Charter of 1857 did not require the Bridge Company to construct a way for carriages and pedestrians, and that the state could not impose additional burdens on a franchise once granted. The court said:

“1. The International Bridge Company, by the act of 1857, obtained from the state of New York the right to build a bridge over land in New York to the center of the Niagara river. It may well be doubted whether, in view of the language used in the act, the bridge company were obligated, if it built a bridge, to provide a way for carriages and pedestrians. The state, of course, in granting the charter, reserved to itself the right to amend it at any time, but this reservation did not authorize the state, the charter having been accepted and acted upon to the extent that it had ripened into property rights, to deprive defendant of the benefits thus obtained without compensation. (*Monongahela Navigation Co. v. United States*, 148 U. S. 312; *People v. O'Brien*, 111 N. Y. 1.) Nor could the state impair the value of the franchise by imposing additional burdens without paying for it. (*Trustees of Southampton v. Jessup*, 162 N. Y. 122.)” (R. p. 199.)

People of the State of New York v. International Bridge Co., 223 N. Y. 137, 143, 144.

But the state court held that the bridge was not built under the act of 1857, but under the act of 1869 (Chap. 550), providing for the consolidation of the New York and Canadian corporations. On this subject the court said:

“If it be assumed the act of 1857 did not impose an obligation upon the defendant to build ways for pedestrians and vehicles, the Canadian act certainly did. The language of that act was: ‘Said bridge shall be constructed as well for the passage of persons on foot and in carriages and otherwise as for the passage of railroad trains.’ When the two corporations, therefore, were consolidated, with their consent and the consent of the state of New York, the defendant became obligated to construct a bridge for railroad trains, foot passengers and vehicles. The charter thus given by the consolidating act was accepted subject to whatever duties were imposed upon either or both of the old corporations. The bridge, as we have seen, was built under the consolidating act, but provision was made only for railroad trains. It had by the acceptance of the charter obligated itself to build one also for pedestrians and vehicles. Compelling it to keep its implied agreement to do what the charter required does not impair the obligation of the contract or impose additional burdens.”

The proper construction to be placed upon the Canadian act of incorporation, and upon the act of consolidation, thus becomes vital and decisive under the decision of the Court of Appeals. The New York court assumed to construe the Canadian act *de novo*, ignoring the construction which had already been placed upon it by the Canadian courts.

The highest court in the Province of Ontario has held that the Canadian charter, as well as the New York charter, is only permissive in this respect, and has refused to require the Bridge Company to construct a bridge for foot passengers and vehicles.

Attorney - General vs. International Bridge Co., 6 Ont. Appeal Reports, 537 (Ex. 9, introduced at p. 72; printed at pp. 180-187).

The learned Trial Court refused to find, as requested by defendant, that the Canadian Court held and determined that this provision was permissive, and not mandatory, and imposed upon the corporation no obligation to construct foot-paths or roadways across its bridge. (Defendant's Request to Find VIII; pp. 31-32.) To this defendant duly excepted (Defendant's Exception XIV, p. 48). The Court found instead that it was held and determined that the Attorney-General of the Province of Ontario was not the proper party plaintiff to maintain such an action; that the bridge did not constitute a nuisance, and that the Court did not have jurisdiction to grant the relief

demanded (Decision, Finding VIII, pp. 56, 57), to which defendant duly excepted (Defendant's Exception I, p. 47). It will be necessary, therefore, to consider this decision in some detail.

It is true that the question of the standing of the Attorney-General of Ontario was considered by the Court, and the Learned Judge, writing the opinion, said: "I am *disposed to think* the Attorney General of Ontario is not the proper party to file this information." But the decision was expressly placed upon the broader ground that it was not obligatory upon the company to build the footway and roadway, but that the statute was merely permissive, the Court saying:

"If the information had contained only such allegations as those upon which the decree is based, omitting all reference to the structure being a nuisance, and confining its prayer to the relief now granted, I apprehend it would have been demurrable, both on the ground that no contract with the public is shown, and because the Attorney-General for Ontario, who can represent only a limited portion of the public with whom, if at all, such a contract exists, has no *locus standi* on such application."

* * * * *

"But I am of opinion that no grounds have been shown for the interference of the Court. It is now perfectly well established, since the decision of the Exchequer Chamber in *Regina vs. York and North Midland R. W. Co.*, 1 E. & B., 858, that Acts of this description are

not to be regarded, as they had come to be regarded, as contracts; that they are what they profess to be and nothing more; they give conditional powers which if acted upon carry with them duties. Statutes may be so framed as to render it obligatory upon the companies to proceed with the works, but that is not so in the present case; the words of the Act are simply permissive; nor is there in my opinion, anything in the argument that although originally permissive it ceased to be so and became obligatory when once begun. Suppose the company had constructed the foot-way as to the least expensive portion of the work, and then finding the railway bridge too expensive had abandoned it, could it be contended with any force that the shareholders should, at a ruinous loss to themselves, proceed with its construction? Yet that must follow, if this argument be sound." * * *

"For these reasons I think this decree cannot be supported, for I assume the fact to be, not that a foot-way for passengers has been made, but that parties can manage to pass on foot by the side of the track, and that that portion of the bridge has not been completed any more than the carriageway in compliance with the Act of Parliament."

If any part of the Court's opinion was *obiter*, it was that portion relating to the status of the Attorney General of Ontario. At most, the case is one where there are two grounds, upon either

of which the judgment of the Court can be sustained, and in such case the ruling on neither is *obiter*, but each is the judgment of the court and of equal validity with the other.

Union Pacific Co. vs. Mason City Co., 199
U. S., 160, 166.

Railroad Companies vs. Schutte, 103 U.
S., 119.

It is well settled that the construction placed upon a foreign act by the courts of its own jurisdiction is conclusive upon our courts and is in effect a part of the foreign law.

“This court has uniformly professed its disposition, in cases depending on the laws of a particular state, to adopt the construction which the courts of the state have given to those laws. This course is founded on principles supposed to be universally recognized, that the judicial department of every government where such department exists, is the appropriate organ for construing the legislative acts of that government. Thus no court in the universe, which professed to be governed by principle, would, we presume, undertake to say that the courts of Great Britain or of France or of any other nation, had misunderstood their own statutes and, therefore, erect itself into a tribunal which should correct such misunderstanding. We receive the construction given by the courts of the nation as the true sense of the law and

feel ourselves no more at liberty to depart from that construction than to depart from the words of the statute."

Marshall, C. J., in *Elmendorf v. Taylor*,
10 Wheaton, 152, 159.

So where the English statute of limitations was enacted here the English construction came with it.

McDonald v. Hovey, 110 U. S. 619, 628.

The same rule was applied by this court to parts of the interstate commerce act adopted from the English traffic act.

Interstate Commerce Commission v. Baltimore & Ohio Ry., 145 U. S. 263, 284.

The subject of foreign judgments is extensively discussed in *Hilton v. Guyot*, ¹⁵⁹~~105~~ U. S. 113, where a judgment of France was held *prima facie* binding.

The general rule is that judgments rendered in England, or Canada, or any other foreign jurisdiction, subject to the English common law, will be conceded conclusive effect in the United States, if not impeachable for fraud, lack of jurisdiction or like causes, since the principles of common law as now held recognize judgments based thereon as conclusive on the merits.

Wharton on Conflict of Laws, Vol. 2, Sec. 654-A, page 1409.

Thus a Canadian judgment is conclusive like that of one of our own states.

Ritchie v. McMullen, 159 U. S. 235.

The Bridge Company, after the passage of the Acts of Consolidation, and of the Act of Congress of 1870, constructed its bridge without any foot-path or roadway, as a railroad bridge solely, and has operated it as such for more than forty years, with the full assent of the State of New York and Dominion of Canada.

The New York Legislature has recognized this structure as built and has acquiesced in the form of its construction. Twenty-four years after the bridge was completed as a railroad bridge solely, the charter of the Bridge Company was amended by Chap. 332 of the Laws of 1898, which empowered the Company to increase its capital stock and to borrow money "for the purpose of its incorporation" and to mortgage its property and franchises to secure the payment of such debts. Under the Act of Consolidation quoted above, the consolidated corporation was already empowered to mortgage its franchises to build its bridge. (Laws of 1869, Chap. 550, Sec. 11, Exhibit 3, pp. 70, 71.) Thus the Legislature expressly authorized the corporation to pledge as security for its debts the franchises now sought to be impaired.

By the Act of 1898, Sec. 16 of the Charter was amended so as to permit the Bridge Company to charge the tolls prescribed whenever the bridge should be completed for the passage of "cars or other vehicles", that section having previous-

ly provided that such tolls might be demanded when the bridge was completed for the passage of ordinary teams and carriages. This act was an acquiescence and assent by the Legislature, if such were needed, to the construction and maintenance of this bridge for railroad purposes solely.

(B) The New York Act of 1915 impairs the franchises of the Bridge Company by imposing upon it the additional burden of constructing and maintaining a highway bridge between the mainland of New York State and Squaw Island, in said state, all of the franchises conferred upon, and accepted and acted upon by the corporation, whether derived from the state, national or Canadian governments, having been limited to the construction and maintenance of a bridge between the City of Buffalo and Canada.

The learned Court of Appeals misapprehended the scope of the contention of the Bridge Company in regard to the alteration and impairment of its franchises, treating the Act of 1915 merely as a mandate that the company construct a footway and roadway, which, in its opinion, were already required by the New York Act of Consolidation of 1869 and ignoring entirely the Act of Congress in 1874 declaring the bridge a lawful structure as constructed, without footway or roadway.

Neither the New York Act of 1869, however, nor any other act prior to that of 1915, required the Bridge Company to construct, maintain or operate a foot and vehicle bridge between Buffalo and Squaw Island. Neither the acts of the New York

Legislature, nor of the Canadian Parliament, nor of Congress required or permitted the Bridge Company to construct and operate a bridge between Buffalo and Squaw Island, or to give access to its bridge from Squaw Island, or to build approaches to its bridge on Squaw Island, as required by necessary implication by the Act of 1915, which provides:

"A roadway * * * and a pathway * * * shall be constructed upon the draw across Black Rock Harbor *giving a passage-way over said draw between Squaw Island and the mainland of New York State.*"

These were absolutely new burdens imposed upon franchises long ago vested in the Bridge Company, and are not to be justified by any reference to the Canadian Act or the New York Act of 1869, passed before the bridge was built, which acts if they required any highway on the bridge required one giving access to Canada, and not one giving access to Squaw Island.

The original charter granted by the State of New York provides for a corporation:

"For the construction, maintaining and managing a bridge across the Niagara River from the City of Buffalo to some point near Fort Erie in Canada, * * * said bridge to be constructed with two draws, one across Black Rock Harbor and the other across the main channel of the river."

Chap. 753 of the Laws of 1857, Section 1
(Exhibit 1, p. 70).

The Canadian charter provided for the organization of a company:

“For constructing, maintaining, working and managing *a bridge across the Niagara River from some point at or near the Village of Waterloo (known as Fort Erie) * * * to the City of Buffalo * * **”

Caption 227—Twentieth Victoria (Exhibit 2, p. 70).

The act authorizing the consolidation of the Canadian and American companies provided that:

“It shall and may be lawful for said corporation to consolidate * * * with * * * any corporation now existing under the laws of the late Province of Canada * * * for the purpose of creating and maintaining *a bridge across the Niagara River at or near the Village of Fort Erie * * * to the City of Buffalo.*

Chap. 550, Laws of 1869, Section 3 (Exhibit 3, pp. 70, 71).

The power of the Bridge Company to borrow money and to mortgage its property and franchise as security therefor, is restricted to the “*purpose of its incorporation,*” by Section 11, Chapter 550 of the Laws of 1869, as amended by Chapter 332 of the Laws of 1898. Therefore, it would be impossible for the corporation to issue bonds secured by mortgage for the purpose of construct-

ing this roadway to Squaw Island, for this is not a "purpose of its incorporation."

The Act of Congress, passed in 1870, provided:

"That any bridge and its appurtenances, which shall be constructed *across the Niagara River from the City of Buffalo, New York, to Canada*, in the pursuance of the provisions of an act of the Legislature of the State of New York, entitled 'An Act to incorporate the International Bridge Company,' * * * shall be lawful structures and shall be so held and taken and are hereby authorized to be constructed and maintained as provided by said act and such amendments thereto, anything in any law or laws of the United States to the contrary notwithstanding,"

It is apparent from the above quotations from the various statutes of the State of New York, and the Dominion of Canada (as well as acts of Congress of the United States), that the International Bridge Company *has no franchise to construct, maintain or operate a bridge between Buffalo and Squaw Island*, and such an onerous and undesirable franchise cannot now be forced upon it without its consent. Its franchises are solely to construct and operate a bridge between the City of Buffalo and the Dominion of Canada. It was a mere coincidence that Squaw Island happened to lie across the course of the bridge. Because of this fact, the bridge was necessarily built across Squaw Island, originally on trestle work, which has since been filled in. The legal situa-

tion, however, is no different than it would be if the bridge had a single abutment or pier, resting upon the island. There has never been any access from the bridge to the island. The mere accident that owing to the physical situation, the bridge between Buffalo and Canada has been built in a somewhat unusual form, having one draw across the east branch of the river between the mainland of the City of Buffalo and Squaw Island, then a trestle now filled so as to present the appearance of a solid embankment across the island, and finally another draw across the main channel of the Niagara River, does not alter the legal status of the structure so as to permit the Legislature to treat the draw across Black Rock Harbor between Buffalo and Squaw Island as a separate bridge.

The Court of Appeals fell into obvious error in this respect, for it based its decision sustaining the New York act of 1915, requiring a foot and vehicle bridge from Buffalo to Squaw Island, upon the provision of the Canadian Act of 1857, that—"The said bridge shall be as well for the passage of persons on foot and in carriages and otherwise as for the passage of railway trains," which it construed as mandatory, and which it held became obligatory upon the consolidated corporation under the New York Act of 1869. But the Dominion of Canada had jurisdiction only over that portion of the bridge within the limits of its territory, viz., that portion of the bridge west of the international boundary in the Niagara River, and wholly west of Squaw Island; while the New York Act

of 1915 operates on the portion of the bridge between Buffalo and Squaw Island, and east of the international boundary.

The provision in the Canadian Act, though unlimited in its terms, could and did only operate on that portion of the bridge within Canadian territory. This inherent limitation was as valid and binding as though the Canadian Act had expressly provided that it applied only to that portion of the bridge within the Dominion of Canada. Nor has the territorial operation of the Canadian Act of 1857 been extended by the New York Act of 1869, which merely authorized the consolidation of the New York and Canadian corporations into a single corporation, possessing all the rights, privileges and franchises, and subject to all the disabilities and duties of each of said corporations.

This the Canadian Court recognized when the matter was brought before it in 1881. The court said:

“But I think that independently of these considerations it is manifest that the jurisdiction of this court to grant relief cannot extend beyond the limits of the Province, and it being a fundamental principle of the law of mandamus, as well as of injunction, that it will never be granted in cases where if issued it would prove unavailable, there could be no object in giving the public the right to pass over the bridge as far only as Squaw Island; and if for no other reason this court should not interfere.”

(Exhibit 9, page 186.)

Whether the provision of the Canadian act, that the bridge shall be as well for the passage of persons on foot and in carriages as for the passage of trains, be deemed to confer a right and privilege, or to impose a disability and duty, such provision, being a creation of Canadian law, deriving its vitality solely therefrom, and extending only to that portion of the bridge within Canadian territory, the New York Legislature, in adopting it and imposing it upon the consolidated corporation, *adopted it as it then existed, as a provision confined to the Canadian portion of the bridge.* The New York Legislature could not impose on the consolidated corporation the duty of constructing and operating a footway and roadway on the portion of the bridge within New York State, by merely adopting a Canadian statute requiring the corporation to construct and maintain such a footway and roadway on the portion of the bridge within the Dominion of Canada. That would go beyond making the consolidated corporation "subject to all the disabilities and duties of each of such corporations" (N. Y. Laws 1869, Chap. 550, Sec. 6), and would impose a new disability and duty to which neither of such corporations were subject.

Where two railroad companies, created under the laws of Delaware and Maryland respectively, were thereafter consolidated by statutes of each state, providing in substance that the new company should possess all the rights and privileges vested in the original companies, or either of them, this court said:

“The purpose of the two provisions was to vest in the new company the rights and privileges which the original companies had previously possessed under their separate charters; the rights and privileges in Maryland which the Maryland company had there enjoyed, and the rights and privileges in Delaware which the Delaware company had there enjoyed; *not to transfer to either State and enforce therein the legislation of the other.* The new company was clothed by the legislature of Delaware, so far as that legislature could clothe it, with all the rights and privileges of both the original companies; but as the Maryland company took under the legislation of Maryland only exemption from taxation of its shares in Maryland, the privilege of the new company in this matter could only be a similar exemption in that State, not a similar exemption of the shares of its capital stock from taxation in Delaware. The new company stood in each State as the original company had previously stood in that State, invested with the same rights, and subject to the same liabilities. And the act of consolidation, so far as Delaware was concerned, had only this effect.”

The Delaware R. R. Tax, 18 Wallace, 206, 227, 228.

See also *Central R. R. & Banking Co. v. Georgia*, 92 U. S. 675, 676,

Chicago & N. Y. Ry. Co. v. Auditor General, 53 Mich., 79, 91, 92 (Opinion by Judge Cooley).

The Court of Appeals admits that the New York Act of 1915 cannot be sustained if it be regarded as imposing a new burden on the franchise granted to the Bridge Company, but only if it be construed as enforcing an obligation willingly assumed by the corporation at the time of the consolidation. But it is clear that it does impose a new burden on the franchise, for the Act of 1915 operates exclusively on the portion of the bridge east of the international boundary line and within the territory of New York, which was not affected by the requirements of the Canadian statute operating solely on the portion of the bridge west of that line.

(C) *The New York Act of 1915 impairs the franchises of the Bridge Company by drastically reducing the tolls authorized by the New York and Canadian Acts of Incorporation.*

The maximum tolls which the Bridge Company might charge were fixed by the New York Act incorporating the Company (N. Y. Laws 1857, Chap. 753, Sec. 16, Exhibit 1, p. 70).

The Canadian act did not specify the maximum tolls to be charged, but apparently vested power to fix the tolls in the Board of Directors by the following provisions:

“IX. The said board of directors shall have and be invested with full power and authority to conduct, manage and oversee and transact all and singular the concerns, affairs and business of the said corporation, and all matters and things whatever in any

wise relating to or concerning the same, and, amongst other things * * *

“Seventhly. To make the necessary by-laws in reference to the powers and duties imposed and conferred upon the said board by this act, and generally for the government and management of the said corporation, subject always to the provisions of this act and of the laws of this Province; with power to the said board to vary, alter, repeal or revive any of the said by-laws * * *.”

(Chap. 227, 20th Vic., Sec. 9, Exhibit 2, p. 70.)

The maximum tolls thus authorized by the New York and Canadian Acts of Incorporation were continued by the acts passed in 1869 permitting the consolidation of the two corporations “into a single corporation possessing all the rights, privileges and franchises, and subject to all the disabilities and duties of each of such corporations”. (N. Y. Laws 1869, Chap. 550, Sec. 6, Exhibit 3, pp. 70 and 71; Chap. 65, 32nd and 33rd Vic., Exhibit 4, p. 71.) The provisions of the Acts of the New York Legislature relating to tolls were adopted by Congress, which authorized the bridge “to be constructed and maintained as provided by said act (to wit: Chap. 753 N. Y. Laws 1857) and * * * amendments thereto”. Congress further enacted that all railway companies should have equal rights and privileges in the passage of the bridge and in the use of the machinery and fixtures thereof, upon such terms

and conditions as should be prescribed by the District Court of the United States for the Northern District of New York in case of disagreement between the parties. (Act of Congress of 1870, Chap. 176, Exhibit 5, page 71.)

The District Court, in a suit brought under this provision, held that Congress had left the power to fix railroad tolls where the acts of incorporation placed it, in the directors of the corporations, and that the jurisdiction conferred upon the District Court was confined to enforcing equality of use as between railroads.

Canada Southern Ry. Co. v. International Bridge Co., 8 Fed. Reporter, 190.

For the convenience of the court we will place the tolls authorized by the acts of incorporation, and adopted and approved by Congress, in parallel columns with the tolls fixed by the New York Act of 1915:

*Tolls authorized by Acts
of Incorporation and
Adopted by Congress.*

*Tolls fixed by New York
Laws of 1915,
Chapter 666.*

For foot passengers 25c	For foot passengers, one way 3c
	For foot passengers, round trip..... 5c
For horse and rider 50c	For horse and rider. 5c
For horse and sin- gle carriage..... 60c	For carriage and oc- cupants 10c
For 2 horses and double carriage \$1.00	For automobile and occupants 10c
	For loaded wagons and automobile trucks for commer- cial purposes, 2c per ton of material carried.
	For empty wagons and automobile trucks for commer- cial purposes, and drivers thereof... Nothing

When the tolls in the left-hand column were fixed in 1857, and when they were continued by the New York Legislature in 1869 and adopted by Congress in 1870, the cost of labor and material was but a small fraction of what it is today.

It will be remembered that the Court of Appeals sustained this act against the contention of the Bridge Company that it impaired its franchises, on the sole ground that the act merely enforced the pre-existing duty and obligation of the corporation under the Canadian act of incorporation and the New York Act of 1869 to construct and maintain a footway and roadway upon its structure (Record, pp. 199-200). If such obligation rested upon the Bridge Company (which we deny), it was inextricably involved with the franchise of the corporation to charge the tolls allowed by the New York and Canadian acts of incorporation and the acts of consolidation. Moreover, Congress having approved and adopted these tolls across this international structure, it was thereafter beyond the power of the State of New York to alter and reduce them.

Covington Bridge Co. v. Kentucky, 154
U. S. 204.

The only possible answer to this contention is that the Act of 1915 does not conflict with the tolls fixed in the acts of incorporation and adopted by Congress, because it covers an entirely distinct field, not covered by those acts, *i. e.*, the construction and operation of a highway bridge between Buffalo and Squaw Island, within the State of New York, and the tolls to be charged across such intrastate highway bridge. But this contention involves the admission that a new duty and obligation is imposed on the Bridge Company by the Act of 1915, impairing its franchises, and that a new

burden is placed upon the international and interstate commerce for which the bridge was created, by compelling the Bridge Company to incur expense to provide facilities for purely intrastate traffic. We leave it to our opponents to decide which horn of this dilemma they prefer.

The New York Act of 1915 impairs the property rights of the Bridge Company vested under previous legislation. Doubtless the general franchises of the Bridge Company, such as the franchises to be a corporation, issue stock, borrow money, adopt by-laws, etc., are subject to modification by the Legislature under its reserved power, but the special franchise to construct, maintain and operate a bridge across the Niagara River, whether derived from the State of New York or from Congress, being once granted became a contract which could not be impaired by subsequent legislation, and a vested property right entitled to all the protection conferred upon private property of any sort, by the State and Federal constitutions.

Monongahela Navigation Co. vs. United States, 148 U. S. 312.

Trustees of Southampton vs. Jessup, 162 N. Y., 122, at 126.

Ives vs. South Buffalo Railway Co., 201 N. Y., 271, 318.

The reserved power to alter, suspend or repeal corporate charters does not extend to revoking or impairing special franchises acquired by a corporation. This is true, though such franchises be embodied in a special act of incorporation.

A leading case on this subject is *People vs. O'Brien* (111 N. Y., 1). In that case a street railway company was incorporated in 1884, and by its charter was empowered to mortgage its franchises, which it subsequently did to secure bonds issued by it. In the year of its incorporation the City of New York granted to the company a franchise for a street railway in Broadway and the company constructed its road. Rumors of corruption in connection with the granting of this franchise were rife, and culminated in the passage of an act by the Legislature, in 1886, dissolving the corporation, and assuming to transfer its franchises to others. The New York Court of Appeals said, per Ruger, J.:

“When we consider the generality with which investments have been made in securities based upon corporate franchises throughout the whole country; the numerous laws adopted in the several states providing for their security and enjoyment, and the extent of litigation conducted in the various courts, state and federal, in which they have been upheld and enforced, there is no question, but that in the view of legislatures, courts and the public at large, certain corporate franchises have been uniformly regarded as indestructible by legislative authority, and as constituting property in the highest sense of the term.”

* * * * *

“The power to repeal the charter of a corporation cannot, upon any legal principle, in-

clude the power to repeal what is in its nature irrepealable, or to undo what has been lawfully done under power lawfully conferred. (*Butler vs. Palmer*, 1 Hill, 335)."

* * * * *

"An express reservation by the legislature of power to take away or destroy property lawfully acquired or created would necessarily violate the fundamental law, and it is equally clear that any legislation which authorizes such a result to be accomplished indirectly, would be equally ineffectual and void."

This decision has been steadily and consistently followed by the State and Federal courts.

Suburban R. T. Co. vs. Mayor, 128 N. Y. 510, 520.

Coney Island R. R. Co. vs. Kennedy, 15 N. Y. App. Div. 588.

"No property right acquired under a state statute can be divested by repeal."

People ex rel. Reynolds vs. Common Council, 140 N. Y., 300, 307.

The Court of Appeals, speaking of *People vs. O'Brien*, said:

"The only proposition there decided was that the reservation of the power to alter or repeal the charter of a corporation did not

reserve the powers to revoke or recall franchises given to it to construct a railroad."

City of New York vs. Bryan, 196 N. Y., 165.

Speaking of the effect of the New York Public Service Commissions Law, requiring the consent of the Commission to the exercise of a railroad franchise, and forbidding the assignment or transfer of such a franchise unless the transfer was approved by the Commission, the Court of Appeals said:

"The franchise of the Third Avenue Railroad Company was property and could not be destroyed. (*People vs. O'Brien*, 111 N. Y., 1). * * * Therefore, no consent could be made a prerequisite to either the transfer or enjoyment of the franchises."

People ex. rel. T. A. Ry. Co. vs. Public Service Com., 203 N. Y., 299, 308.

In another case the Court of Appeals said:

"The first obstacle that confronts the appellants in this case is the repeal of the statute under which the petitioning corporation was organized and by which its franchises were acquired. * * * The repeal, however, could not operate to confiscate any valid franchise or property right which the Long Sault Development Company had previously acquired under the act repealed (*People vs. O'Brien*, 111 N. Y., 1)."

Matter of Long Sault Development Company, 212 N. Y., 1, 8.

This case was appealed to this Court, and the appeal dismissed upon the ground that no federal question was involved, the decision in the Court of Appeals having been based upon the ground that the Act of 1907 conferring the franchises exceeded the powers of the legislature under the state constitution. This Court said:

“The grants of the Act of 1907 are such that if it was a valid law upon their being accepted they constituted property or contract rights of which the plaintiff could not be deprived and which could not be impaired by subsequent legislation * * *.”

Long Sault Development Company vs. Call, 242 U. S., 272, 276.

“It cannot be disputed that franchises of this nature are property and cannot be taken or used by others without compensation. *Monongahela Co. vs. United States*, 148 U. S., 312; *People vs. O'Brien*, 111 N. Y., 1, and cases cited.”

Willcox vs. Consolidated Gas Company, 212 U. S., 19, 44.

Where a Telephone Company was granted a franchise to use the streets for purposes of its wires, etc., by an ordinance containing a reservation of the right to alter and amend, this Court

held that this was merely a reservation of police control and did not reserve the right to revoke or repeal the ordinance.

Owensboro vs. Cumberland Telephone Co., 230 U. S., 58, 66 and 72.

The International Bridge Company's franchise to build, maintain and operate a bridge between Buffalo and Canada is wholly distinct from its franchise to be a corporation. This special franchise may be sold or mortgaged and may be exercised by an individual transferee.

Memphis & Louisville Ry. Co. vs. Railroad Commissioners, 112 U. S., 609, 616.
Matter of Longacre Electric Light & Power Co., 188 N. Y., 361, 368.

The purchasers of the Bridge Company's bonds had the right to rely upon the inviolability of its franchise, which alone gave value to its tangible property. Such a franchise is irrevocable as distinguished from the franchise of corporate existence, which is subject to alteration or repeal by the Legislature. Such a franchise survives the dissolution of a corporation or the repeal of its charter, and vests finally in the stockholders, in the same manner as the tangible property of the Company.

A substantial alteration of a franchise, by which it is impaired, or additional burdens are imposed upon it, is forbidden as much as its total destruction or repeal. Such a case was *Rochester Turn-*

pike Road Co. vs. Joel (41 N. Y. App. Div., 43), where an amendment to the charter depriving the company of its right to exact tolls for bicycles, was held unconstitutional, although its franchise, in other respects, was not affected.

Where a Town Board granted a franchise to make a roadway and erect a bridge over lands under water, it was held that the grantee had a right to construct a roadway of the usual sort, of earth and stone, and could not thereafter be compelled to construct a roadway upon an open trestle, nor could the franchise be revoked because of his refusal to do so.

Trustees of Southampton vs. Jessup, 162 N. Y., 122.

Where the City of New York attempted to impose a license fee on street cars after granting a franchise for their operation, the Court of Appeals said:

“Assuming that the Common Council had power to make the grant, then its acceptance by Pearsall and his associates, signified by the execution of the agreement with the conditions annexed thereto and the duties and obligations resulting therefrom, invested the latter with the right of property in the franchise which the Common Council could not take away or *impair* by any subsequent act of its own.”

Mayor, etc., vs. Second Avenue Railroad Company, 32 N. Y., 272.

A statute requiring a Company authorized to maintain a permanent bridge, to erect a draw-bridge, has been held unconstitutional.

Washington Bridge Company vs. State,
18 Conn., 84.

A franchise to maintain a double-track railway through the streets of a city is impaired by the repeal of so much of the ordinance as related to double tracks, with the result of restricting the railway company to a single track for a portion of the authorized distance of its road on which the track had not yet been laid. The state court sustained this repeal as a proper exercise of the police power, but this Court held otherwise.

Grand Trunk Western Ry. v. South Bend,
227 U. S. 544.

A municipal ordinance requiring a private water company, having a franchise to lay pipes in the streets of the city, to pay a license fee to the municipality impairs its franchise.

Boise Water Co. v. Boise City, 230 U. S.
84.

Where a gas company had acquired the right under the Constitution of California to lay its pipes through the streets of a city, its franchise could not thereafter be impaired by a city ordinance making it unlawful to make any excavation in a street without written permission from the Board of Public Works, though such ordinance was passed pursuant to an amendment of the

State Constitution permitting the municipality to prescribe conditions and regulations under which gas service might be supplied to the inhabitants.

Russell v. Sebastian, 233 U. S. 195.

Suburban railroad companies acquired franchises from the local authorities outside of the City of Detroit which permitted them to charge a higher rate of fare than was fixed by the ordinances granting like franchises to street railroads in the city. These companies were afterwards consolidated with a street railroad company operating in the City of Detroit. Thereafter, by acts of the Legislature, the limits of the city were so extended that portions of the outlying railways were embraced therein. These acts provided that the territory annexed should be subject to all the laws of the state applicable to the city and to all the ordinances and regulations of the city. The city and state contended that the outlying lines, in so far as they had come within the city through its extension, came also within the fare restrictions of the city ordinances. This court held that the act of the Legislature could not impair the obligation of the existing contracts fixing the higher rates for the suburban lines.

Detroit United Railway v. Michigan, 242 U. S. 238.

The statute in question is a substantial alteration and impairment of the original franchise in three particulars. First, it *compels* the construction of a roadway and pathway, which was left optional in the original charter and by all legisla-

tion affecting the bridge down to the present time; Second, it treats the Black Rock Harbor draw as a *separate bridge*, ignoring the fact that neither the original charters of the New York and Canadian corporations, nor any subsequent legislation has ever imposed upon this Company the duty to maintain a bridge between Buffalo and Squaw Island; Third, it reduces drastically the tolls authorized by the acts of incorporation and approved by Congress.

POINT II.

The Court of Appeals erred in holding that the tolls fixed by the New York Act of 1915 for the use of the roadway and pathway between Buffalo and Squaw Island are not confiscatory, and do not deprive the Bridge Company of its property without due process of law.

The New York Court of Appeals said:

“As to the contention that the act of 1915 is confiscatory and deprives defendant of its property without due process of law, but little need be said. The trial court found as a fact, and the finding has been unanimously affirmed by the Appellate Division, that ‘the probable cost of constructing the roadway and foot-path required by chapter 666 of the Laws of 1915, is insignificant in comparison to the assets and annual net earnings of the defendant.’ It also found, and this finding was also unanimously affirmed, that there is no evidence in the record showing that the

investment required by chapter 666 of the Laws of 1915 would not yield a reasonable return to the defendant. These findings, as it seems to me, are fatal to the appellant's claim. If the investment necessary for the construction of roadways would not enable defendant to earn a fair return upon its investment then it was incumbent upon it to establish that fact. (*Willcox v. Consolidated Gas Co.*, 212 U. S. 19; *Missouri Pacific Ry. Co. v. Kansas*, 216 U. S. 262.) The court cannot assume, in the absence of such proof, that the act is confiscatory or that it in any way interferes with rights possessed by defendant." (Record p. 202.)

People v. International Bridge Co., 223 N. Y., 137, 148, 149.

There were no findings made by the trial court, either as to the cost of constructing the footpath and roadway, the cost of operation, or the income available from it. The finding that "the probable cost of constructing the roadway and footpath required by Chap. 666 of the Laws of 1915 is insignificant in comparison to the assets and annual net earnings of the defendant" (pp. 64 and 65, fols. 248, 249) and the further finding that there is no evidence in the record that the investment required by the statute would not yield a reasonable return (p. 65, fols. 249, 250), are mere conclusions of law without any findings of fact to sustain them. *The court has not found what the required investment would be, what the cost of*

operation would be, or what the return would be, even approximately. It is also apparent that these findings are tainted with error, for the court necessarily refers to the assets of the defendant devoted to interstate and foreign commerce, and its earnings derived therefrom, these being its only assets and earnings.

We respectfully submit that the difficulty in this branch of the case lies not in lack of evidence, of which there was ample, but in the failure of the Trial Court to make appropriate findings of fact, due to the adoption of an erroneous theory of law.

We have shown under our previous point the drastic reduction made by the Act of 1915 in the tolls authorized by the acts of incorporation. Such reductions, ranging from 85% to 90% of the original tolls, at a period when prices of materials and labor have enormously increased, raise a fair presumption that the new tolls fixed by the Act of 1915 are confiscatory. As though to emphasize this fact, the Act of 1915 expressly provides that no charge shall be made for the use of the roadway for empty wagons or automobile trucks used for commercial purposes, or for the drivers thereof. The learned counsel for the State, recognizing the radical nature of this provision, ingeniously suggests that the toll fixed for loaded wagons and trucks is a toll for the round trip. This theory finds no support in the statute which says nothing about a round trip in this instance, though it does specify the toll for the round trip for foot passengers; nor is there any suggestion by the Court of Appeals that the act should be so interpreted.

The toll for loaded trucks and wagons is for one way, and if they return loaded, they pay another toll. Empty trucks and wagons and their drivers, on the other hand, can go back and forth all day without paying anything. An empty wagon or truck might go from Buffalo to Squaw Island in the morning, be used for "commercial purposes" all day on the Island, and return free at night. It might go back and forth during the day to get gasoline for the motor, feed for the horses, or for the convenience of the driver and still be exempt from tolls. If the construction project planned by the Squaw Island Companies should ever be actually undertaken, it is probable that the transportation of materials about the Island would be performed by trucks from Buffalo, which would cross empty in the morning and return empty at night. That this provision is confiscatory and void is too clear for extended argument.

Willcox vs. Consolidated Gas Co., 212 U. S., 19.

Missouri Pacific Ry. Co. vs. Nebraska, 217 U. S., 196.

San Diego Land Co. vs. National City, 174 U. S., 739, 757.

San Diego Land Co. vs. Jasper, 189 U. S., 439, 442.

The learned Trial Court refused to find as requested by defendant "that the cost of construction of a wing addition * * * adequate to sustain a suitable roadway 16 feet wide and a footway with proper approaches thereto, including the cost of the land necessary for such approaches,

would have been approximately \$44,000.00 on the 31st day of December, 1915, and on the 1st day of June, 1915, the cost would have been approximately \$200.00 less than on December 31st of said year'' (Defendant's requests to find, XXVI, p. 40).

The evidence is that at the time of trial the cost of such a wing across the Black Rock Harbor span, and approaches, would be approximately \$44,778.92, and the annual, fixed charge for maintenance and operation would be approximately \$8,374.00, less a plain error in computation of \$1,400.00 which reduces this amount to \$6,974.00 (Testimony of H. R. Safford, Chief Engineer of defendant, pp. 82 and 86). On December 31, 1915, the cost of the wing would have been \$750 or \$800 less, owing to the increase in the price of steel since that time (p. 99). These estimates provide for a wing strong enough to sustain the weight of a trolley car. The present specifications of the New York Highway Commission for the loading of highway bridges provides for a steam roller of 18 tons, and the amount of steel which would be required on this arm to conform to that specification would be very little less than that required for a 50-ton trolley car, as provided in the above estimate (p. 174, fols. 695, 696). This evidence is undisputed, the estimate made by the State's witness being on the basis of a roadway 12 feet wide and a 4-foot sidewalk (p. 161, fol. 643), which the witness was compelled to confess would not allow the passage of two automobile trucks, either loaded or empty, without causing one truck to ex-

tend over the sidewalk and endanger pedestrians. The witness admitted that to make a reasonable allowance for accidents and blunders of drivers, the roadway ought to be 16 feet wide (p. 162, fols. 645-648); and it is quite évident that the estimate of this witness would not allow for a wing which would meet the requirements of the State Highway Commission of the State of New York, nor one that could be safely used for the purposes for which this wing is intended. Nor was anything allowed for the cost of the approaches.

It is undisputed that Squaw Island is at present an undeveloped strip of land, except for some boat houses on the shore line, although defendant's request to find to this effect was refused by the learned trial court, probably through misunderstanding (Defendant's Request XXII, p. 38, fol. 151; Exception to Refusal XV, p. 47, fol. 185).

The photographs (Exhibits 31-A to 47 inclusive) which will be presented to the Court upon the argument, show the situation clearly, having regard always to the fact that such buildings as appear upon these views, other than boathouses, are situated not on the Island but on the mainland, it being impossible to exclude them from the picture owing to the low level of the Island. The Island, with the exception of a strip 75 feet wide on the Black Rock Harbor side, running from the Bridge to the south end of the Island, and a corresponding strip on the north side of the bridge about 1,000 feet long, owned by the Federal government, and the right-of-way of the Bridge Company, is owned by the Squaw Island Development

Corporation or possibly by the Squaw Island Freight Terminal Company, Inc., the parties interested in these two corporations being the same (pp. 148, 158). These companies own about 100 acres of upland and 24 acres of land under water (p. 148). All the people on the Island are their tenants except a few squatters on the government lands (p. 148). The tenants pay \$1.00 a foot front per year (p. 127). There are from 100 to 125 boathouses on the Island, some for gasoline launches but most of them for rowboats, and the owners of the boathouses use the Island as a headquarters for boating, fishing and recreation. Thirty to forty of these boathouses are on the east side of the Island, south of the bridge (pp. 123, 124), *i. e.*, upon the government lands, hence they must be squatters. The north end of the Island is level ground, and is used for baseball and football (p. 124). Mr. Kellogg, who collects the rent for the owner, says there are not more than half a dozen families who live on the Island the year around (p. 149). There are no streets or roadways on the Island (p. 129). As many as 1,000 or 1,200 people have congregated on the Island for baseball games or outdoor sports, and a good many people go there to gather flowers (pp. 130, 131). There is free access to the Island over Ferry Street and the Ferry Street bridge and over the government lock in Black Rock Harbor, as well as over the ice in the winter time (pp. 124, 125, 126). It is entirely problematical how many of the people living on the Island, or attending picnics and baseball games, or gathering

flowers, would pay the bridge toll of 5 cents while such free access continued. Knowledge of human nature suggests that the figures given would be subject to a substantial diminution on this score. In short, the Island appears to be used much as vacant lots in the city are used, and it does not follow by any means that the persons making such use of it would pay even the very small tolls prescribed by the act. Nor does it follow that a public service corporation should invest thousands of dollars and be mulcted additional thousands every year to make the Island more accessible for such sporadic use, any more than a street railroad company should be compelled to build a line to a vacant field to provide for occasional picnics, ball games or botanizing parties.

The government improvement has interfered with access to the Island, and has cut down the number of tenants, cutting the rentals in two (pp. 126, 132, 151). But even now there are numerous means of free access to the Island (pp. 126, 127, 128).

Mr. Kellogg admitted that he would not ask for the construction of the wing addition for the accommodation of the tenants of the owner (p. 152).

Plans were introduced in evidence showing an extensive, projected development of the Island, including slips cut into the Island from the Black Rock Harbor side, giving access to spur tracks from a main line of tracks running along the river front of the Island and connecting with the tracks of the Grand Trunk Railway Company upon the bridge (Exhibit B). It also appeared that numer-

ous corporations had been organized for the development of the Island in various ways, all of these corporations being composed of the same individuals. All of this, however, is future and speculative, and there is no certainty that such projected development will be carried out.

The only actual, existing, commercial development on the Island consists of the removal of sand and gravel by the Squaw Island Sand & Gravel Corporation, which in the year beginning June, 1915, took out 66,000 yards or 100,000 tons of gravel (p. 139). Assuming that all of this traffic would be carried over the bridge by trucks, at the rate prescribed by the statute of 2 cents per ton, this business would bring in a revenue of \$2,000 per annum. If we assume that the passenger traffic would amount to 10,000 persons making the round trip, per annum, which is far in excess of what is justified by the evidence, this would add \$500.00 revenue, making a total revenue in sight of \$2,500.00 as against \$6,974.00 cost of maintenance and operation.

The defendant is required by the terms of this statute to contribute substantially \$4,500 per annum for the benefit of the business and tenants of the Squaw Island Development Co. or the Squaw Island Freight Terminal Co., Inc., which ever may be the present owner of the land.

This is on the assumption that all traffic available from the sand and gravel business would pass over the highway arm of the bridge; but experience teaches that where water and rail transportation are equally available, heavy freight,

such as gravel, almost invariably seeks the water route because of the lower rate. Especially would this be true where the gravel deposit is so situated as to be immediately accessible both to the Great Lakes and the Erie Canal. The result would undoubtedly be that the only traffic passing over the highway arm of the bridge would be the local business of the Gravel Company in the City of Buffalo. What proportion this is of its total output, as shown, we are not informed.

No more flagrant case of private legislation has ever been brought to our attention. The Island is owned by a single corporation; the only business upon the Island is carried on by a subsidiary corporation, organized by the same interests; the only other occupants of the Island are tenants of the owner, using the same (with the exception of some half dozen families who stay there the year around) for boating and fishing purposes during the summer. The legislation by which the Bridge Co. is required to make an investment of substantially \$44,000.00, and incur an annual charge of nearly \$7,000.00, is purely for the benefit of a small group of gentlemen who have incorporated themselves under many names. We submit that this is a clear case of taking private property for *private* use, in violation of the Constitution of the United States and of the State of New York.

There are constitutional limits to what can be required of public service corporations, even under the somewhat elastic police power. Requiring the expenditure of money, *takes property*, whatever may be the ultimate return for the outlay.

It is beyond the police power of a state to compel a public service corporation to furnish access, at its own expense, to a private business, unless it shall appear that the income presently available as the result of such expenditure, will furnish a fair return upon the investment.

Missouri Pacific Ry. vs. Nebraska, 217 U. S., 196.

San Diego Land & Town Co. vs. National City, 174 U. S., 739, 757.

San Diego Land & Town Co. vs. Jasper, 189 U. S., 442.

The income to be derived from the bridge through tolls is of the very essence of its franchise. No corporation will build a bridge if it may not be paid for its use a sufficient sum, not only to give it a reasonable return upon the capital originally invested, but also to provide for rebuilding and improving the structure as necessary from time to time. This bridge, constructed between 1870 and 1873, was necessarily re-built 24 years later, in 1899; and the Black Rock Harbor span, directly involved in this action, was entirely replaced for the third time by a much larger and more expensive structure, under command of the Secretary of War in 1906. These facts, common in the history of bridges carrying heavy traffic over much navigated waterways, must be considered in connection with the adequacy of the tolls fixed by statute.

POINT III.

The Court of Appeals erred in holding that the assets of the Bridge Company, devoted wholly to foreign and interstate commerce and furnishing an instrumentality therefor, and its earnings derived wholly from such commerce and furnishing an instrumentality therefor, might be considered in determining whether the tolls fixed by the New York Act of 1915, for intrastate commerce and the use of an instrumentality for such commerce, were confiscatory.

The trial court expressly found:

“That all of the commerce passing over the bridge of the defendant across the Niagara River between the City of Buffalo, N. Y., and the Dominion of Canada, is either interstate commerce or foreign commerce between the United States and foreign nations and said bridge is an instrumentality of such interstate and foreign commerce.” (Decision XVIII Finding of Fact, pp. 61 and 62.)

The operation of a bridge for foreign and interstate commerce across the Niagara River is the sole business which the plaintiff in error conducts, or is authorized to conduct by the acts of its incorporation. It necessarily follows that all of its assets are devoted to this business, and all of its earnings are derived therefrom; yet these are the assets and earnings which the court considered when it found that the probable cost of constructing the roadway and footpath required by the Act of 1915 is insignificant in comparison to the assets

and annual net earnings of the defendant (pp. 62 and 63).

This was gross error.

The rates fixed by the statute must stand by themselves and cannot be justified upon the ground that the defendant is making money upon its interstate and foreign commerce. The rule first announced in *Smyth vs. Ames* (169 U. S., 466 at 541) was again stated by Mr. Justice Hughes in the *Minnesota Rate cases* (230 U. S., 352, at page 435), as follows:

“Where the business of the carrier is both interstate and intrastate, the question whether a scheme of maximum rates fixed by the State for intrastate transportation affords a fair return, must be determined by considering separately the value of the property employed in the intrastate business and the compensation allowed in that business under the rates prescribed. This was also ruled in the *Smyth* case. The reason, as there stated, is that the State cannot justify unreasonably low rates for domestic transportation, considered alone, upon the ground that the carrier is earning large profits on its interstate business, and, on the other hand, the carrier cannot justify unreasonably high rates on domestic business because only in that way is it able to meet losses on its interstate business.”

See also *Chic., M. & St. P. Ry. Co. vs. Tompkins*, 176 U. S. 167.

Seaboard Air Line Ry. vs. Florida, 208 U. S. 26.

This being the rule, the evidence introduced by the learned Attorney-General over our objection and exception as to the present earnings of the Bridge Company, derived solely from foreign and interstate commerce (Exhibits M to R-1, pp. 178, 179, fols. 702-705), must be entirely disregarded as having no bearing upon the question of adequacy of the rates fixed by the statute.

The finding of the court that there is no evidence in the record showing that the investment required by the act of 1915 would not yield a reasonable return to the defendant, is plainly based upon this incompetent evidence, and upon the erroneous theory that such investment might be considered in connection with other assets of the corporation, and the return therefrom with its other earnings, as may be done in cases where it is not necessary to separate a specific item, because both interstate and intrastate commerce are not involved.

POINT IV.

The Court of Appeals erred in holding that the New York Act of 1915 did not contravene the commerce clause of the Constitution, and acts of Congress passed thereunder, including (a) acts specifically relating to the construction and operation of said bridge, and the improvement of Black Rock Harbor, and (b) the general act relating to bridges over navigable waters of the United States, to wit: Section 9 of the Rivers & Harbors Act of 1899 (Chap. 425 of the Acts of 1899).

The International Bridge is subject to the paramount jurisdiction of the United States in five aspects:

First: As a possible obstruction to navigable waters of the United States which form an international boundary.

Second: As an instrument of foreign and interstate commerce.

Third: As a connecting link between the United States and a foreign nation.

Fourth: The Black Rock Harbor span of the bridge is within exclusive federal jurisdiction for the additional reason that it is a structure over lands and waters of which the United States is the owner in fee.

Fifth: Congress has expressly conferred upon the Federal District Court final authority in regard to the use of the bridge by railroads.

In all of the above respects the federal control over the bridge is, in its very nature, not only paramount, but exclusive.

It has always been within the power of Congress to exercise exclusive control over bridges across the Niagara River, both as obstructions to navigation and as instruments of foreign commerce. Any power which the State of New York might have over the subject could only exist by reason of silence and inaction on the part of Congress. The power of the state, if it existed at all, was not inherent, but permissive, and ceased to exist the moment that Congress entered the field and exert-

ed its dominant and all-embracing authority in the matter.

Wisconsin v. Duluth, 96 U. S. 379, 387.

Chicago R. T. & P. Ry. Co. v. Hardwick Elevator Co., 226 U. S. 426, 435.

The exertion by Congress of a power which is granted in express terms must supersede all legislation over the same subject by the states.

U. S. vs. Utah Power & Light Co., 209 Fed. R. 554, 559.

Mich. Cent. R. R. Co. vs. Vreeland, 227 U. S. 59, 66.

Ry. Co. vs. Hesterly, 228 U. S. 702.

Gulf, Colorado & Santa Fe Co. vs. Hefley, 158 U. S. 98, 104.

The Federal Government has manifested its purpose to exercise exclusive control over this particular bridge by a long series of legislative enactments and administrative acts. Before the bridge was built an act of Congress was passed prescribing the conditions upon which it might be erected.

This first act, passed by Congress in 1870 (Chap. 176), provided in substance that any bridge and its appurtenances, which should be constructed in pursuance of the provisions of the acts of the New York Legislature should be lawful structures and that such bridge should be an established post route for the mails of the United States. But this act further provided that the

erection of the bridge should be subject to the approval of the Secretary of War; that it should have at least two draws of not less than 160 feet in width in the clear between the piers, and the piers should be parallel to the current of the river, and that the bridge should be subject in its construction to the supervision of the Secretary of War, to whom the plans and specifications should be submitted for approval. *These were all new provisions not found in the acts of the New York Legislature.* This act is notable in that it treats of the bridge not merely as a possible obstruction to navigation, *but also indicates the intention of Congress to regulate it as an instrument of interstate and foreign commerce.* Thus, after the provisions designed to prevent obstruction to navigation, the second section of the act provides as follows:

“And all railway companies desiring to use the said bridge shall have and be entitled to equal rights and privileges in the passage of the same and in the use of the machinery and fixtures thereof and of all the approaches thereto, *under and upon such terms and conditions as shall be prescribed by the District Court of the United States of the Northern District of New York* upon hearing the allegations and proofs of the parties in case they shall not agree.” (Exhibit 5, p. 71.)

Congress thus emphasized the international character of the bridge by expressly providing for federal jurisdiction of controversies as to its use.

The act shows clearly that Congress realized the vast importance of this Bridge as an instrument and pathway of foreign and interstate commerce leading from Buffalo to the Dominion of Canada, and providing a means of communication by the short route through Canada between the western states and the Atlantic seaboard. The above provision in the Act of Congress of 1870 was construed by the District Court of the Northern District of New York in an action brought by the Canada Southern Railway Company against International Bridge Company in the year 1881. It was there held that the provision quoted was designed to enforce equality of use as between the various railroads which might desire to pass over the bridge, and that it was not the intention of Congress to empower the Court to fix rates of toll. The discussion of the Act by the District Court is, however, illuminating. The Court said:

“It was an inherent condition to the complete enjoyment of the grant conferred by the State of New York and the Dominion of Canada upon the corporation, that Congress should sanction the undertaking proposed, as Congress was a necessary party to any compact which involved the cession of the sovereignty of the United States over that part of the Niagara River lying within the boundaries of the State of New York. The river is a public, navigable water, and under the power to regulate commerce Congress undoubtedly had the right to prohibit obstructions to its navigation; to declare any obstruction a pub-

lie nuisance; to declare what degree or description of obstruction should be a public nuisance; to direct the mode of proceeding in the courts of the United States to remove it; and to punish any one who might erect or maintain it. *Taney vs. Wheeling Bridge Co.*, 13 How., 579. The franchises granted by the State of New York and the Dominion of Canada were accepted by the bridge company, subject to the right of Congress to intervene whenever its power to regulate commerce should be invoked, and to determine what should be the character and extent of its intervention. *Gilman vs. Philadelphia*, 3 Wall., 725; *The Clinton Bridge*, 10 Wall., 454; *County of Mobile vs. Kimball*, 102 U. S., 691."

* * * * *

"In view of the fact that the bridge to be built was to be not only an erection which might interfere with commerce upon a public, navigable river, but was to be a highway of commerce between the eastern and western states which might seek the shorter route through Canada, it was reasonable to expect that the protection of that commerce would find recognition at the hands of Congress; and it was not to be expected that Congress would devolve the duty of that protection on any other than one of its own tribunals. Accordingly it was but reasonable that the act should require the bridge company to submit itself to the jurisdiction of a court of the United States, within whose territorial juris-

diction the bridge was to be, whenever controversies should arise concerning the rights of the railway companies, and involving the measure of protection declared by Congress."

Canada Southern Ry. Co. vs. International Bridge Co., 8 Fed. Reporter, 190.

After the completion of the bridge, and in the year 1874, a supplemental act of Congress was passed, expressly approving the modification in the plans and declaring the bridge as constructed a lawful structure. *This act is important, because it shows the distinct approval of Congress to the omission of the roadway and footpath mentioned in the Canadian and New York acts of incorporation.*

Act of June 23, 1874, Chap. 475 (Exhibit 6, p. 71; Decision, Findings VI and VII, pp. 55, 56).

Congress thus adopted certain provisions of the New York acts by incorporating them in the act passed by it in 1870, modified certain other provisions and wholly omitted still others, and in the act of 1874 *entirely dispensed with the requirements of the State Legislature relating to roadway and footway* (if it was a requirement and not, as we claim, a mere permission), thereby exercising its paramount and exclusive authority over the whole subject.

When the bridge was re-built in 1899, plans were approved by the Secretary of War, which provided

for a footpath and carriageway across the entire bridge from Buffalo to Canada (Exhibit 10), but did not provide for any access to Squaw Island. After the re-construction was commenced, however, it became apparent that the abutments of the bridge would not stand the weight of such a wing in addition to the heavier bridge required for railroad use. The footpath and carriageway were, therefore, dispensed with. This alteration in the plans was known to the United States engineer officer who supervised the reconstruction, and was by him brought pointedly to the attention of his superiors. In a letter dated September 9, 1901, he reported:

“That the bridge has been altered and the changes have been completed but not in accordance with the plans proposed by the company and approved by the Secretary of War. The plans as proposed and approved called for a widening of the bridge by building out on the sides, roadway and foot-walks, and the reconstruction of the draw rest pier and the consequent narrowing of the navigable channels at the draw bridge.

When the parties in authority undertook to do the work they came to the conclusion that the piers would not stand the additional widening proposed, and they, therefore, simply built a stronger and heavier bridge of about the same width as the old bridge and practically not increasing in any manner the obstruction of the bridge to the navigability of the river.

The bridge as reconstructed has a clearance of about two feet more than the old structure. The width over all is the same. The structure, as it now exists, has a single railway track, without carriage way or walk.

The work having been completed, I make this report and will, unless otherwise directed, drop this from my list of duties."

(Exhibit 11, p. 72.)

The War Department having had this alteration in the plans brought thus squarely to its attention, acquiesced in it, and raised no objection to the omission of the footpath and roadway.

(Decision, Finding X, pp. 57, 58.)

The improvement of Black Rock Harbor being already in contemplation at the time of this reconstruction, the Secretary of War inserted in his approval of the plans a paragraph as follows:

"That if the Secretary of War shall thereafter deem it necessary or advisable that the portion of the bridge over Black Rock Harbor shall be remodeled or changed in any manner, such change shall be made by the owners of the bridge or their assigns, at their own expense."

(Decision, Finding IX, p. 57.)

Thus the Secretary of War, at the time of this reconstruction in 1899, required the Bridge Company, as a condition to the approval of its plans, *to acknowledge the paramount jurisdiction of the*

War Department over the Black Rock Harbor draw.

Shortly afterwards the Black Rock Harbor improvement was undertaken by Congress, as appears by Exhibits 12 to 24 (pp. 72-75). It appears from these exhibits that Congress expended several million dollars on this improvement; that as a condition of undertaking the improvement, Congress insisted that the State of New York should cede to the United States of America the lands under the waters of Black Rock Harbor and the adjacent portion of the Erie Canal; that the Attorney General of the State of New York rendered an opinion, stating that he believed that this could be lawfully done (contained in Exhibit 14); that an act was passed by the Legislature authorizing such a conveyance (Chapter 373 of the New York Laws of 1904, Exhibit 16); that appropriate resolutions were passed by the Canal Board and Commissioners of the Land Office (Exhibits 15 and 18) and that such a conveyance was actually executed (Exhibit 19). This deed from the People of the State of New York to the United States of America, dated July 25, 1905, conveys:

“All the right, title and interest of the State of New York in and to the lands and structures in the City of Buffalo, County of Erie and State of New York, described as follows:

* * * * *

(b) The wall or partition between Black Rock Harbor and the Erie Canal from Station 49 and 50, as shown on map and filed with

papers in the application, to the foot of Amherst Street, including the uplands adjacent to the present ship-lock.

(c) *All the land under water of Black Rock Harbor from the foot of Maryland Street to and including the present ship-lock, including also the land owned by the State near the ship-lock and within the limits of the proposed improvement.*

(d) *The grant to the United States of the right to use the present Erie Canal, with a grant of land under its water from the New York Central Railroad bridge at the foot of Vermont Street, extended north to the Amherst Street crossing, and a grant of the land used a tow-path for the same distance.*

* * * * *

which lands are required by the United States in the construction of a ship canal from Lake Erie to the foot of Squaw Island in the City of Buffalo and the County of Erie.

TO HAVE AND TO HOLD the said lands and structures unto said the United States of America so long as the United States constructs and maintains said ship canal."

(Decision, Findings XI, XII, pp. 59, 60.)

It was stipulated upon the trial that this deed includes the lands under the Black Rock Harbor span of the International Bridge (Record p. 74, fols. 286, 287).

The trial court expressly found that—"said lands and waters have ever since been under the exclusive jurisdiction of the United States, which has exercised undisputed authority over them, in connection with the improvement of Black Rock Harbor * * *".

(Decision, Finding XII, p. 60.)

It thus appears that the State of New York has surrendered to the United States of America every claim and right, which it might otherwise have had, in and to the waters and lands under water, crossed by the Black Rock Harbor span of the International Bridge; that such surrender was required by the federal government as a *condition* of proceeding with the improvement, and was consented to by the State of New York because of the great benefits which would accrue to the State from having the improvement carried out.

This canalized stream remained navigable water of the United States for all purposes of federal jurisdiction and regulation.

United States vs. Cress, 243 U. S. 316,
326.

And the legal effect and import of the conveyance of the State of New York were to place absolute ownership in the improvement and appurtenances in the United States, which proprietary rights thereby became added to the jurisdiction and control that the United States possessed over Black Rock Harbor as a navigable water.

Green Bay Co. vs. Patton Paper Co., 172
U. S., 58, 79.

It is a leading case where Congress took under its protection and control an improvement started by private enterprise at Duluth, consisting of a canal across Minnesota Point, connecting the waters of Superior Bay with those of Lake Superior, and made appropriation for the maintenance and enlargement of the work, this Court discussed the general policy of the National Government in regard to the improvement of navigable waters as follows:

"It is to be observed, as preliminary to an examination of the acts of the general government in the special matter before us, that the whole system of river and lake and harbor improvements, whether on the seacoast or on the lakes or the great navigable rivers of the interior, has for years been mainly under the control of that government, and that *whenver it has taken charge of the matter, its right to an exclusive control has not been denied.*"

* * * * *

"We do not feel called upon to make an argument to prove that these statutes of the Congress of the United States, and these acts of the Executive Department in carrying those statutes into effect, constitute an adoption of the canal and harbor improvement started by the City of Duluth, and a taking exclusive control of it. That *they amount to*

the declaration of the Federal government, that we here interpose and assert our power. We take upon ourselves the burden of this improvement, which properly belongs to us, and that hereafter this work for the public good is in our hands and subject to our control.

“If the merest recital of these acts of Congress, and of the War Department under them, do not establish that proposition, we can have little hope of making it plain by elaborate argument.

“Nor can there be any doubt that such action is within the constitutional power of Congress. It is a power which has been exercised ever since the government was organized under the Constitution. The only question ever raised has been how far and under what circumstances the exercise of the power is exclusive of its exercise by the States. And while this Court has maintained, in many cases, the right of the States to authorize structures in and over the navigable waters of the States, which may either impede or improve their navigation, *in the absence of any action of the general government in the same matter, the doctrine has been laid down with unvarying uniformity that when Congress has, by any expression of its will, occupied the field, that action was conclusive of any right to the contrary asserted under State authority.* The adjudged cases in this court on this point are numerous.” (*Italics ours.*)

Wisconsin vs. Duluth, 96 U. S., 379.

Where the Secretary of War established new harbor lines and required the removal of wharves which were within the harbor lines established by the State and Federal authorities when erected, this Court held that the power of the States over navigable waters is subordinate to that of Congress, and the State can grant no right to the soil of the bed of navigable waters which is not subject to Federal regulation.

Philadelphia Co. vs. Stimson, 223 U. S., 605.

Greenleaf Lumber Co. vs. Garrison, 237 U. S., 251.

How much more must this be the case when the United States actually owns the bed of the river by conveyance from the state itself.

In connection with the Black Rock Harbor improvement, the Secretary of War, as indicated in the approval of the plans of 1899, required the reconstruction of the Black Rock Harbor span of the International Bridge (Exhibit 23, p. 25, Decision, Finding XIII, p. 60). This span of the bridge was accordingly reconstructed under the supervision of the Secretary of War. Plans were submitted by the Bridge Company and were approved by the Secretary of War (Exhibits 25 and 26). These plans showed in dotted lines "Provision for future roadway" and contained a note as follows: "Roadway shown in dotted lines not to be put in at present but provision is made in the design of the bridge for their future construction." The plans made no provision for access

to Squaw Island, for the only roadway ever contemplated by anyone was a roadway straight across the bridge from Buffalo to Canada. The structure was completed without the roadway and has been accepted by the Secretary of War in the usual manner, since the passage of Chapter 666 of the Laws of 1915 (Exhibits 30 and 31, p. 76; Decision, Findings XIV and XV, pp. 61, 62).

Notwithstanding the approval by the Secretary of War of these plans and of the plans of 1899 showing a highway wing addition, it is more than doubtful whether the Bridge Company could have constructed such a highway wing without again obtaining the consent of Congress. The Bridge Company might have built a combined railroad and highway bridge under the Act of Congress of 1870; but after the bridge was completed as a railroad bridge only, and Congress passed the Act of 1874 approving the modification of plans, consisting of the omission of the highway wing, and declaring the bridge as constructed to be a lawful structure, the right of the Bridge Company to construct such a highway wing would seem to have been lost by abandonment of that part of its franchise with the approval of Congress. Nothing short of a new franchise from Congress could empower the Bridge Company to construct a highway wing upon this international bridge thereafter. The powers delegated by Congress to the Secretary of War extend only to the regulation of bridges as obstructions to navigation. The mere approval of plans by the Secretary of War cannot confer, revive or enlarge a franchise.

Hubbard v. Fort, 188 Fed. R. 987.

In any event, the most that can be claimed is that Congress and the Secretary of War left it optional with the Bridge Company whether, and when, such roadway should be constructed. The question arises sharply whether the state can make mandatory that which Congress and the Secretary of War have left as optional. We are not without the guidance of authority on this point.

In an early case, this Court said:

“If Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner and in a certain form, it cannot be that the State Legislatures have a right to interfere; and, as it were, by way of complement to the Legislation of Congress to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case *the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any farther legislation to act upon the subject-matter. Its silence as to what it does not do is as expressive of what its intention is, as the direct provisions made by it * * * the will of Congress upon the whole subject is as clearly established by what it had not declared as by what it has expressed.*” (*Italics ours.*)

Prigg v. Commonwealth of Pennsylvania,
16 Peters, 539, 617.

In a case holding that an act of Louisiana forbidding discrimination by common carriers by land and water against persons of color, was a regulation of interstate commerce, and, therefore, unconstitutional, this Court said:

“Differences of opinion may exist as to the extent and operation of the national law regulating commerce among the several States, but none, it is presumed, will venture to deny that it is regulated very largely by congressional legislation. Admit that, and it follows that the legislation of Congress, if constitutional, must supersede all State legislation upon the same, and by necessary implication, prohibit it, except in cases where the legislation of Congress manifests an intention to leave some particular matter to be regulated by the several States. *Cooley v. Board of Wardens, supra.*

Decisive authority for that proposition is found in the unquestioned decisions of this Court. Such were the views of Judge Story more than thirty-five years ago. * * * *The Chusan*, 2 Story, 466; *Sinnot v. Davenport*, 22 How., 227.”

Hall v. DeCuir, 95 U. S. 485.

“The regulation of commerce may consist in abstaining from prescribing positive rules for its conduct * * *. And when it is manifest that Congress intends to leave that commerce, which is subject to its jurisdiction,

free and unfettered by any positive regulations, such intention would be contravened by state laws operating as regulations of commerce, as much as though these had been expressly forbidden. In such cases, the existence of the power to regulate commerce in Congress has been construed to be not only paramount but exclusive, so as to withdraw the subject as the basis of legislation altogether from the states."

Smith v. Alabama, 124 U. S. 465, 473.

In a recent case holding that a statute of South Carolina imposing a penalty on carriers for failure to settle or adjust claims within forty days was an unconstitutional burden on interstate commerce, in conflict with the Carmack Amendment, this Court said:

"It is suggested that the act is in aid of interstate commerce. The state law was not contrived in aid of the policy of Congress, but to enforce a state policy differently conceived and the fine of \$50 is enough to constitute a burden. *Southern Ry. v. Reid*, 222 U. S., 424-443. But that is immaterial. *When Congress has taken the particular subject matter in hand coincidence is as ineffective as opposition, and a State law is not to be declared a help because it attempts to go farther than Congress has seen fit to go.*" (*Italics ours.*)

Charleston & W. Car. Ry. Co. v. Varnville Furn. Co., 237 U. S. 597.

Where Congress enacted a law providing that certain classes of railroad employees should not work more than nine hours a day, and the New York Legislature enacted a law providing that the same employees should not work more than eight hours a day, the New York Court of Appeals upheld the State Act as supplemental to the Act of Congress, and not in conflict therewith. In reversing this decision, this Court said:

"We realize the strength of these observations, but they put out of view, we think, the ground of decision of the cases, and, indeed, the necessary condition of the supremacy of the congressional power. *It is not that there may be division of the field of regulation, but an exclusive occupation of it when Congress manifests a purpose to enter it.* * * *

The 'Hours of Service' law of March 4, 1907, is the judgment of Congress of the extent of the restriction necessary. It admits of no supplement; it is the prescribed measure of what is necessary and sufficient for the public safety and of the cost and burden which the railroad must endure to secure it." (*Italics ours.*)

Erie R. R. Co. v. New York, 223 U. S., 671.

In one of the safety appliances cases this Court said:

"Under the Constitution, the nature of that power (to regulate commerce) is such that

when exercised it is exclusive, and *ipso facto*, supersedes existing state legislation on the same subject.

* * * * *

The test, however, is not whether the state legislation is in conflict with the details of the Federal Law or supplements it, but whether the State had any jurisdiction of a subject over which Congress had exerted its exclusive control." (Italics ours.)

Southern Ry. Co. v. Railroad Com. of Indiana, 236 U. S. 439, 446, 448.

The Congressional Hours of Service Law, by its terms, did not go into effect until one year after its passage. The State of Washington had previously enacted a law upon the subject which was substantially identical with the act of Congress. This Court held that the State law became inoperative at once upon the enactment of the act of Congress, and before the latter had gone into effect. The Court said:

"It is elementary * * * that the right of a state to apply its police power for the purpose of regulating interstate commerce * * * exists only from the silence of Congress on the subject and ceases when Congress acts on the subject or manifests its purpose to call into play its exclusive power. * * * It results that as the enactment by Congress of the law in question was an assertion of its power, by the fact alone of such

manifestation that subject was at once removed from the sphere of the operation of the authority of the state."

Northern Pacific R. R. Co. vs. Washington, 222 U. S., 370.

Very recent cases in this Court again emphasize the rule that when Congress has exercised the powers reserved to it by the Constitution the situation permits of no divided empire, and state jurisdiction of the same subject matter is completely ousted.

Thus an employe of a railroad company has a right of action for damages resulting from violation of the Federal Safety Appliance Act, even though he was engaged at the time in intrastate commerce. This Court said:

"In the exercise of its plenary power to regulate commerce between the States, Congress has deemed it proper, for the protection of employees and travelers, to require certain safety appliances to be installed upon railroad cars used upon a highway of interstate commerce, irrespective of the use made of any particular car at any particular time. Congress having entered this field of regulation, it follows from the paramount character of its authority that state regulation of the subject-matter is excluded."

Texas & Pacific Ry. vs. Rigsby, 241 U. S.,
33.

In *N. Y. C. R. R. Co. v. Winfield*, 244 U. S., 147, it was held that the liabilities and obligations of interstate railroad carriers to make compensation for personal injuries suffered by their employees while engaged in interstate commerce, are regulated both inclusively and exclusively by the Federal Employers' Liability Act, and Congress having thus fully covered the subject, no room exists for state regulation, even in respect of injuries occurring without fault, as to which the Federal Act provides no remedy. Hence, an award under the New York Workmen's Compensation Act for injuries not attributable to negligence could not be upheld. This Court said:

"It is settled that under the commerce clause of the Constitution, Congress may regulate the obligation of common carriers and the rights of their employees arising out of injuries sustained by the latter where both are engaged in interstate commerce; and it also is settled that when Congress acts upon the subject all state laws covering the same field are necessarily superseded by reason of the supremacy of the national authority."

* * * * *

"True, the act does not require the carrier to respond for injuries occurring where it is not chargeable with negligence, but this is because Congress, in its discretion, acted upon the principle that compensation should be exacted from the carrier where, and only where,

the injury results from negligence imputable to it."

* * * * *

"Thus the act is as comprehensive of injuries occurring without negligence, as to which class it impliedly excludes liability, as it is of those as to which it imposes liability. In other words, it is a regulation of the carriers' duty or obligation as to both. And the reasons which operate to prevent the States from dispensing with compensation where the act requires it equally prevent them from requiring compensation where the act withholds or excludes it."

See also:

Erie Railroad Company v. Winfield, 244 U. S. 170.

In *N. Y. C. R. R. Co. v. Tonsellito* (244 U. S., 360), it was held that a father could not recover for loss of services and expenses resulting from the injury of his minor son while engaged in interstate commerce, in addition to the son's right of action, because the right of action provided by the Federal Employers' Liability Act was exclusive, and superseded all rights of recovery under the state law. This Court said:

"The Court of Errors and Appeals ruled, and it is now maintained, that the right of action asserted by the father existed at common law and was not taken away by the Federal Employers' Liability Act. But the con-

trary view, we think, is clearly settled by our recent opinions in *New York Central R. R. Co. v. Winfield*, ante, 147, and *Erie Railroad v. Winfield*, ante, 170. * * * Congress having declared when, how far and to whom carriers shall be liable on account of accidents in the specified class, such liability can neither be extended nor abridged by common or statutory laws of the State."

In *New Orleans & Northwestern R. R. Co. v. Harris* (247 U. S. 367), it was held erroneous to apply the rule created by statute of Louisiana, that proof of injury inflicted by a locomotive should be *prima facie* evidence of negligence in actions against railroads, in an action brought under the Federal Employers' Liability Act. This Court said:

"In proceedings brought under the Federal Employers' Liability Act, rights and obligations depend upon it and applicable principles of common law as interpreted and applied in Federal courts; and negligence is essential to recovery."

In *Southern Pacific Co. vs. Jensen*, 244 U. S., 205, it was held that a stevedore injured in unloading a ship at a port in New York State was not entitled to an award of compensation under the New York Workmen's Compensation Act, but must recover in admiralty, if at all. It was said that the New York Compensation Act was inconsistent with the poli-

ey of Congress manifested in acts limiting the liability of ship owners.

It is equally clear that the New York Act of 1915 is inconsistent with the policy of Congress manifested in the Acts of 1870 and 1874 regulating this bridge as an instrument of foreign and interstate commerce and expressly approving the omission of the highway feature after the completion of the structure.

This court has held that the Federal Employers' Liability Act superseded the New York Statute providing for the distribution of damages recovered by an administrator for decedent's death by negligence as unbequeathed assets of his estate, and that the Federal Act was controlling in regard to the distribution of damages.

Taylor vs. Taylor, 232 U. S. 353.

The New York courts also recognize and apply the principle that a statute of one jurisdiction cannot be pieced out by that of another, for they have held in an action for damages for death by negligence brought in the state courts under a Canadian statute, that interest from the date of decedent's death could not be added to the recovery, in accordance with the New York law, there being no such provision in the Canadian statute.

Kiefer v. Grand Trunk Ry. Co., 12 A. D. 28; Aff'd 153 N. Y. 588.

The cases above cited amply sustain our contention that Congress, having steadily and consistently exerted its undoubted power over this

bridge as an instrument of foreign commerce, the whole subject is withdrawn from the control of the state, which cannot intervene with supplementary requirements and regulations for the benefit of local interests.

The Act of Congress of 1870 was not a mere confirmation of, or license to exercise the franchise granted by the State of New York as assumed by the Court of Appeals. Congress, by this act, assumed control of the whole subject-matter, regulating the bridge not merely as an obstruction to navigation, but also as an instrumentality of foreign and interstate commerce. The reference to the New York acts was merely for convenience, Congress adopting in general the provision of those acts as its own requirements, which thereafter derived their vitality from the act of Congress and not from the state legislation, just as state laws regulating pilots were long ago adopted by Congress and thereby rendered valid.

Gibbons vs. Ogden, 9 Wheaton 1, 207.

Wilson vs. McNamee, 102 U. S. 572, 574, 575.

That Congress acted independently, and that the franchise to bridge the Niagara River derived its life from the act of Congress and not from the acts of the New York Legislature, appears from the fact that Congress did not adopt the New York legislation *in toto*, but with important modifications, imposing new conditions concerning its use as an instrumentality of commerce, by subjecting it to the control of the United States District Court.

So in 1874, after the bridge was completed, Congress expressly approved the modification in the plans, *which consisted in the omission of the roadway and footway*, and declared the bridge as constructed to be a lawful structure, though constructed without such footway and roadway, which the New York Court of Appeals now holds to have been required by the New York Act of 1869.

Thus, though Congress by the Act of 1870 required the bridge to be built in accordance with the New York acts then in force, including the act of 1869 authorizing the consolidation of the New York and Canadian corporations, which, according to the decision of the New York Court of Appeals, imposed the duty of providing a footway and roadway on the bridge, nevertheless, in 1874, after the bridge was completed without any footway or roadway, and hence not in accordance with the acts of the New York Legislature as now construed by the Court of Appeals, Congress expressly approved this modification in the plans and declared the bridge, as constructed, to be a lawful structure. Congress thereby asserted and exercised, in the most unmistakable manner, its paramount authority *to determine the character of the structure, not only as an obstruction to navigation, but as an instrumentality of foreign and interstate commerce*, and in so doing, overruled the requirements of the New York statutes as now construed by the State Courts.

It was competent for Congress to decide that foreign and interstate commerce would be better served by a bridge devoted solely to railroad use

than by combining in one structure a railroad and a highway bridge. This bridge was created and authorized solely as an instrumentality of foreign and interstate traffic. It was to be a link in great interstate and international railroad systems. It was never contemplated, until 1915, that it should be used at all for intrastate commerce. Hence, the power of Congress over the form of the structure was plenary, and it must be concluded that Congress, in approving the change of plans, determined that a railroad bridge would serve more efficiently the enormous interstate and foreign traffic which was destined to pass over the bridge than a combined railroad and highway bridge; that the local demand for highway communication was a minor consideration, and should not be permitted to interfere with this vastly more important interstate and foreign commerce; just as in the *Wheeling Bridge* case, Congress determined that the commerce passing over the bridge was more important than the free navigation of the river, and that the latter must yield to the former.

The wisdom and foresight of Congress was fully justified by the fact that when the bridge was rebuilt, in 1899, the greatly increased traffic and weight of locomotives and cars necessitated a much heavier railroad bridge, and made it unsafe to add highway wings unless the foundations and abutments were rebuilt and enlarged, increasing the obstruction to navigation of the river.

BRIDGES OVER BOUNDARY WATERS:

The paramount and exclusive power of Congress in regard to the construction of bridges over

navigable waterways of the United States, which are boundaries between two states, is well established.

The principle was first asserted in the *Wheeling Bridge* case. It will be instructive to re-examine carefully the facts of that case. That bridge was constructed across the Ohio River under authority of an act of the Virginia Legislature. Subsequently the State of Pennsylvania brought an action in this court alleging that the bridge obstructed the free navigation of the River and a decree was entered that the bridge be elevated to a height designated, or abated. Thereupon, Congress passed an act declaring the bridge *to be a lawful structure in its then position and elevation*, anything in the laws of the United States to the contrary notwithstanding, expressly authorizing the company to maintain its bridge at such elevation and requiring vessels on the river to be navigated so as not to interfere with the bridge. Subsequently the bridge was blown down, and an injunction was procured prohibiting its reconstruction according to the original plan, the decree of this court being invoked to sustain the injunction. This court held that after the passage of the act of Congress declaring the bridge a lawful structure, even though it might be an obstruction in fact, it was not so any longer in contemplation of law; that Congress having exercised its paramount power in favor of the continuance of the bridge, no court could decree its removal. It was claimed that the act of Congress was in violation of the compact between Virginia and Kentucky at the

time of the admission of the latter into the Union, whereby it was agreed—"that the use and navigation of the River Ohio * * * shall be free and common to the citizens of the United States," which compact was assented to by Congress; but it was held that this compact could not operate as a restriction of the power of Congress, under the Constitution, to regulate commerce among the several states, otherwise it would amount to an alteration of the Constitution by Congress and the two states.

Pennsylvania v. Wheeling & Belmont Bridge Co., 18 How. 421.

The parallel here is exact. In the act of 1870 relating to this bridge, Congress assented to and largely adopted the terms of the existing state legislation. It did not and could not thereby estop itself from other and different action later, and in 1874, Congress, in the exercise of its undoubted power over foreign and interstate commerce, determined to override one of the requirements of the state legislation, (assuming for the purpose of argument that a highway on the bridge was such a requirement), and to approve and declare lawful a bridge constructed not in accordance therewith.

It is as useless to invoke the New York act of 1869, upon which the decision of the Court of Appeals is predicated, *after Congress has expressly approved and declared lawful a bridge not constructed in accordance with its terms*, as it was useless in the *Wheeling Bridge* case to invoke the decree of this Court, requiring the elevation or

abatement of the bridge, or the compact between Virginia and Kentucky, though approved by Congress, after Congress had passed a similar act declaring the bridge a lawful structure, and authorizing its maintenance in its then existing elevation.

The act of 1874, approving the change in the plans eliminating the footway and roadway originally contemplated, is vital and decisive in this case, but was entirely ignored by the New York Court of Appeals. This act was based upon a decision of this court.

The Act of 1874 approving the change in plans was drawn and passed about three years after this court had decided a case involving a similar act of Congress legalizing a bridge over the Mississippi River after it was built, and after a suit was begun to enjoin it as a nuisance. This court said of that act:

“We cannot doubt, upon a perusal of the section, but that it was the intention of Congress to legalize the bridge as then constructed across the river, and that the words used carry out fully this intent. It is declared ‘a lawful structure;’ that is, the bridge, as built, with its abutments, piers, superstructures, draw, and height, should have the sanction of law, and be maintained and used in that state and condition until the law was altered by the reserved power in the last section.”

The Clinton Bridge, 10 Wallace, 454, 462.

We see no distinction between that case and this case upon this point. The rule established in the *Wheeling & Belmont Bridge* case, and re-asserted in the *Clinton Bridge* case, was a rule of property on which plaintiff in error was entitled to rely.

Muhlker vs. Harlem R. R. Co., 197 U. S. 544.

Already the decision in the case at bar has proven embarrassing to the New York courts, and they have proceeded to distinguish it on the supposed ground *that it was a case where no authority to construct the bridge came from Congress.* (*People v. Hudson R. C. R. R. Corporation*, 104 N. Y. Misc. 19, pp. 34 and 35; *Affirmed*, 186 A. D., 602, 610). The lower courts have been misled on this point by the opinion of the New York Court of Appeals, which does not mention the Act of Congress of 1874, declaring the bridge, as constructed, a lawful structure, and which dismisses the Act of 1870 authorizing the construction of the bridge with the casual statement that—"The charter thus obtained by defendant (from the Acts of the New York Legislature) was confirmed by the Congress of the United States (Laws 1870, Chap. 176)."

In a case involving the building of a railway bridge across Arthur Kill, between the states of New York and New Jersey, it was held by Mr. Justice Bradley, afterwards of this court, that Congress could empower a corporation, organized under the laws of New Jersey, to build a bridge across the kill, which was a navigable waterway

of the United States and a boundary between New Jersey and New York, notwithstanding that the statutes of New Jersey expressly forbade the building of such a bridge without permission from the State Legislature, which had not been obtained, and although the State of New Jersey was the owner in trust for the people of the state, of the lands under water over which said bridge must pass. It was also held that Congress might confer like authority upon a corporation of New York State, which it might exercise without the consent and against the protest of the State of New Jersey. The court said:

“Still it is contended that although Congress may have power to construct roads and other means of communication between the states, yet, this can only be done with the concurrence and consent of the states in which the structures are made. If this is so, then the power of regulation in Congress is not supreme—it depends on the will of the states. We do not concur in this view. We think the power of Congress is supreme over the whole subject, unimpeded and unembarrassed by state lines or state laws; that in this matter, the country is one, and the work to be accomplished is national; and that state interests, state jealousies, and state prejudices do not require to be consulted. In matters of foreign and interstate commerce there are no states.”

Stockton v. Baltimore & N. Y. R. Co., 32
Fed. Rep. 9, 16. Appeal dismissed, 140
U. S. 699.

See also *Decker vs. Balt. & N. Y. R. R. Co.*, 30 Fed. R. 723.

The case of *Stockton vs. Ry. Co.* was cited with approval in *Luxton v. North River Bridge Co.* (153 U. S. 532) which upheld the power of Congress to create a corporation and empower it to build a bridge across the Hudson River between the states of New York and New Jersey. This court said in that case:

“From these premises the conclusion appears to be inevitable that although Congress may, if it sees fit and as it has often done, recognize and approve bridges erected by either of two states across navigable waters between them, it may, at its discretion, use its sovereign powers, directly or through a corporation created for that object, to construct bridges for the accommodation of interstate commerce by land, as it undoubtedly may to improve the navigation of rivers for the convenience of interstate commerce by water.”

A bridge company received a charter from the State of Kentucky to build a bridge across the Ohio River to Cincinnati, Ohio, the act of incorporation expressly requiring that it be confirmed by the State of Ohio, which was done by act of the Ohio Legislature; the Kentucky act, so confirmed by Ohio, authorized the directors to fix the rates of toll. Congress passed an act declaring the bridge, when completed in accordance with the

laws of Ohio and Kentucky, a lawful structure. Many years afterwards the Kentucky Legislature passed an act greatly reducing the rates fixed by the directors. This act was held void on the ground that the traffic across the river was interstate commerce, and the bridge was an instrument of, and the act of the Kentucky Legislature was an admitted regulation of such commerce, which the state had no power to make, Congress alone possessing the requisite power to enact a scale of charges in such a case.

Covington Bridge Co. v. Kentucky, 154
U. S. 204.

Four of the nine judges of this court taking part in the decision concurred in the result in the *Covington Bridge* case, on the ground that the states have power to establish and regulate bridges between two adjoining states, subject to the paramount authority of Congress over interstate commerce; that by the concurrent acts of Kentucky and Ohio, the Bridge Company was made a corporation in each state and authorized to fix rates of toll; that Congress having declared the bridge, when completed in accordance with the laws of Ohio and Kentucky, a lawful structure, and having made no provision for tolls, thereby manifested its intention that the tolls should be as established by the two states, and that the original acts of incorporation constituted a contract between the corporation and both states which could not be altered by one state without the consent of the other.

Either the majority or the minority reasoning in that case sustains the contention of the plaintiff in error in this case. Whether the jurisdiction of Congress over this international bridge is exclusive, so that the state could not regulate it even in the absence of action by Congress, or whether it was permissible for the state to exercise jurisdiction until its authority was superseded by action of Congress, the result will be the same, for here Congress has acted.

A State cannot, in the exercise of its police power, to prevent floods, order the removal of a bridge that is a necessary part of a line of interstate commerce. This Court said of such an attempt:

"They are out and out orders to remove bridges that are a necessary part of lines of commerce by rail among the States. But that subject-matter is under the exclusive control of Congress and is not one that it has left to the States until there shall be further action on its part. The freedom from interference on the part of the States is not confined to a simple prohibition of laws impairing it, but extends to interference by any ultimate organ."

* * * * *

"The decisions also show that a State cannot avoid the operation of this rule by simply invoking the convenient apologetics of the police power. It repeatedly has been said or implied that a direct interference with commerce among the States could not be justified in this way."

Kansas Southern Ry. vs. Kaw Valley District, 233 U. S. 75.

Other cases where federal control of bridges crossing interstate boundary waters has been strongly asserted, are:

Union Bridge Co. v. United States (204 U. S. 364),

where the Secretary of War compelled the alteration of a bridge erected under state authority in order to accommodate the increased navigation of the river.

Monongahela Bridge Co. v. United States, 216 U. S. 177.

Bridge Company v. United States, 105 U. S. 470.

MISCELLANEOUS STRUCTURES IN BOUNDARY WATERS:

It has been held that state consent to the crossing of a navigable boundary stream between two states, with a pipe line laid under the bed of the stream conveying water to be used in interstate commerce, is not necessary if authority has been obtained from Congress.

Hubbard v. Fort, 188 Fed. Rep. 197.

Where Congress authorized the construction of a dam and lock in the Mississippi River, extending

from the Illinois to the Iowa shore, it was held that the power of Congress over the Mississippi was supreme, because its commerce was interstate and foreign. The court said:

“So that from any view, this river is peculiarly and solely under the power and control of the nation, and the nation can and does act only through Congress, acting either directly or by and through powers delegated. And it is for neither Iowa nor Illinois, and much less an individual, to in the slightest degree attempt to control navigation or commerce on this river. And Congress never has attempted to limit or burden navigation on the river, with but one exception, and that exception is in the interest of interstate commerce by land. When the first bridge across this river (Davenport and Rock Island) was provided for, the owners of steamboats combined to prevent its building, insisting that they had the monopoly of the free use of the river, and that the bridge piers, and draws would delay them, and add to the hazards. But that eminent equity judge and scholar in constitutional law, Judge Love, who so long presided in this court, adopted the argument and phrasing of Abraham Lincoln representing the railway company, and held that interstate commerce should be free ‘across’ as well as ‘lengthwise’ the river. And see *United States v. Railroad Bridge Co.*, 6 McLean, 517, Fed. Cas. No. 16, 114. And now we have near 20 bridges across this river, all built with the ‘assent’ or

‘authority’ of Congress, and all built under the supervision of the Secretary of War or other designated officer, but all built so as to place the lightest possible burden on the commerce of the river.”

Hagerla v. Mississippi River Power Co.,
202 Fed. Rep. 776, 782.

BOUNDARY FERRIES:

The same principle has been applied to boundary ferries, and it has been held that a state may not tax the business of an interstate or international ferry, nor require such a ferry to take out a state or local license.

In a leading case, the State of Pennsylvania attempted to impose a tax on the capital stock of the Gloucester Ferry Co., which was incorporated in New Jersey and conducted a ferry across the Delaware River from Gloucester to Philadelphia. This court held that the business of the ferry was interstate commerce and was not subject to exactions by the State of Pennsylvania.

“Commerce among the States consists of intercourse and traffic between their citizens and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale and exchange of commodities. The power to regulate that commerce, as well as commerce with foreign nations, vested in Congress, is the power to prescribe the rules by which it shall be governed, that is, the con-

ditions upon which it shall be conducted; to determine when it shall be free and when subject to duties or other exactions. The power also embraces within its control all the instrumentalities by which that commerce may be carried on, and the means by which it may be aided and encouraged. * * * And it needs no argument to show that the commerce with foreign nations and between the States, which consists in the transportation of persons and property between them, is a subject of national character, and requires uniformity of regulation. Congress alone, therefore, can deal with such transportation; its non-action is a declaration that it shall remain free from burdens imposed by State legislation."

* * * * *

"In *Gibbons v. Ogden*, Chief Justice Marshall said that laws respecting ferries, as well as inspection law, quarantine laws, health laws, and laws regulating the internal commerce of the States, are component parts of an immense mass of legislation, embracing everything within the limits of a State not surrendered to the general government; but in this language he plainly refers to ferries entirely within the State, and not to ferries transporting passengers and freight between the States, and a foreign country; for the power vested in Congress, he says, comprehends every species of commercial intercourse between the United States and foreign countries."

Gloucester Ferry Co. v. Pennsylvania,
114 U. S. 196, 203-204, 215-216.

A state cannot require an international ferry operated between Sault Sainte Marie, Michigan, and Sault Sainte Marie, Ontario, Canada, to take out a local license as a condition of carrying on its business, pursuant to an ordinance of Sault Sainte Marie, Michigan.

Sault Sainte Marie v. International Transit Co., 234 U. S. 333.

A state has power to establish boundary ferries (interstate), not a part of a continuous interstate carrier system, and regulate the rates to be charged from its shores, in the absence of action by Congress, but always subject to the paramount authority of Congress over commerce.

Port Richmond Ferry v. Hudson County,
234 U. S. 317.

But where Congress has taken control of ferries operated in connection with interstate railroads, the power of the state to regulate such ferries is destroyed. The assumption of power by Congress includes exclusive control of the conveyance of local passengers who are not railroad passengers, when all of such local passenger traffic is interstate.

N. Y. C. R. R. v. Hudson County, 227
U. S. 248.

This court has held that state legislation requiring a railroad ferry company, transporting railroad trains across an interstate river, to carry on a local ferry business across said river, is a direct burden on interstate commerce. In this case, a railroad ferry, which was a link in interstate transportation, was distinguished from a local ferry, and transportation of this character was held not to be ferriage, and not within the state power even where there had been no action by Congress.

St. Clair County v. Interstate Transportation Co., 192 U. S. 454, 468, 469, 470.

The same principle is clearly applicable to the requirements of the New York Act of 1915, that the International Bridge, created purely as a link in interstate and foreign commerce, and operated for more than 40 years as a railroad bridge exclusively under Congressional sanction, shall now construct and operate a local foot and vehicle bridge between Buffalo and Squaw Island in the State of New York.

The reasoning of these cases applies with much greater force to a bridge across an international stream, in which the interests of the nation as a whole must always be involved. Although the plaintiff in error was incorporated under statutes of New York State and the Dominion of Canada, and afterwards obtained the permission of these two sovereignties to consolidate the two corporations thus formed, it did not build its bridge under the authority of the State of New York, but pro-

cured express authority from Congress in the act of 1870, before it started the construction of its bridge, and afterwards procured the ratification by Congress of the alterations made in its construction. This case, therefore, presents precisely the same situation as *Stockton v. Baltimore, etc. R. R. Co.* (32 Fed. Rep. 9) above cited, except that here the state authorities acquiesced in the construction of the bridge under the act of Congress, while in the *Stockton* case the State of New Jersey violently objected and attempted to prevent the construction of the bridge, but the *Stockton* case expressly holds that the power of regulation in Congress does not depend on the will of the states. This being true, the acquiescence of New York State in the construction of this bridge under the authority of Congress was entirely immaterial, and did not confer upon the state any right to regulate the bridge thereafter.

If Congress may authorize a New Jersey corporation to erect a bridge over an interstate stream, against the express prohibition of a New Jersey statute, although the State of New Jersey is the owner of the lands under water, surely Congress may determine the character of a bridge passing over that portion of an international river of which the United States owns the fee of the lands under water; and Congress having failed to require a roadway and footway to be constructed on such bridge, the State of New York cannot make the construction of such roadway and footway compulsory.

Nor can the State of New York seize hold of a bridge thus chartered and designed by the three

governments participating in its creation solely as an instrument of foreign and interstate commerce and compel it to undertake the business of intrastate commerce upon terms fixed by the State.

RAILROAD CASES:

There are numerous cases in this Court holding that state regulations of the operation of railroads within a state are void when they would result in a burden on interstate commerce.

In *Atlantic Coast Line vs. Wharton* (207 U. S., 328), it was held that the exercise of state authority requiring the stopping of interstate trains at certain stations was an interference with interstate commerce repugnant to the Commerce Clause of the Constitution.

In *St. Louis Southwestern Ry. Co. vs. Arkansas* (217 U. S., 136), a state statute compelling railroads to distribute cars for shipment within five days after written application by a shipper, was held to impose a burden on interstate business repugnant to the Commerce Clause.

In *Southern Ry. Co. vs. Reid* (222 U. S., 424), a state statute requiring common carriers to transport freight as soon as received, under penalties for failure was held to conflict with the authority exercised by Congress over the subject of interstate commerce.

In *Seaboard Air Line Ry. vs. Blackwell*, 244 U. S., 310, it was held that a law of Georgia requiring railroad companies to check the speed of trains before public road crossings, so that trains may be stopped in time should any person or thing be crossing the track there, was a direct and unconstitutional interference with interstate commerce where it appeared that the law would have required an interstate train to come practically to a stop at each of 124 ordinary grade crossings within a distance of 123 miles in Georgia.

Wherever interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress and not the State that is entitled to prescribe the final and dominant rule, otherwise, the nation would not be supreme within the national field.

Minnesota Rate Cases, 230 U. S., 352.

In the *Shreveport* case, where it was held that rates prescribed by a State Railroad Commission for intrastate traffic interfered with interstate rates, this Court said:

“It is unnecessary to repeat what has frequently been said by this court with respect to the complete and paramount character of the power confided to Congress to regulate commerce among the several States. It is of the essence of this power that, where it exists, it dominates. Interstate trade was not left to be destroyed or impeded by the rival-

ries of local governments. The purpose was to make impossible the recurrence of the evils which had overwhelmed the Confederation and to provide the necessary basis of national unity by insuring 'uniformity of regulation against conflicting and discriminating state legislation.' By virtue of the comprehensive terms of the grant, the authority of Congress is at all times adequate to meet the varying exigencies that arise and to protect the national interest by securing the freedom of interstate commercial intercourse from local control."

* * * * *

"Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the State, and not the Nation, would be supreme within the national field."

* * * * *

"We are not unmindful of the gravity of the question that is presented when State and Federal views conflict. But it was recognized at the beginning that the Nation could not prosper if interstate and foreign trade were governed by many masters, and, where the interests of the freedom of interstate commerce are involved, the judgment of Congress

and of the agencies it lawfully established must control.”

Houston & Texas Ry. vs. United States,
234 U. S., 342.

This rule has been applied to a variety of circumstances. Thus the Safety Appliance Act has been held applicable to the case of employees of an interstate carrier, though such employees were not at the time of the accident engaged in interstate commerce.

United States vs. Southern Ry. Co., 222
U. S., 20.

Texas & Pacific Ry. Co. vs. Rigsby, 241
U. S., 33.

And the Congressional Hours of Service Act has been held applicable to employees whose duties related both to interstate and intrastate operations.

*Baltimore & Ohio R. R. Co. vs. Interstate,
Commerce Commission*, 221 U. S., 612,
618.

It must follow that Congress having assumed control of this bridge as an instrument of foreign and interstate commerce, for which alone it was created, the State of New York cannot interfere with such control and compel the alteration of the structure so that it may be used as an instrument of intrastate traffic.

An international bridge is a unit in a much stronger sense than an interstate railroad. A railroad is presumed to serve the whole of the territory through which it passes and accommodate local as well as through traffic. A bridge, on the other hand, is a span with fixed termini, whose function is limited to providing a means of transportation between those termini. Although a portion of its structure may pass over land, as is frequently the case, neither the privileges nor obligations of its franchise extend beyond the spanning of its termini, and it cannot be required to serve the territory over which its structure passes.

The parts of the International Bridge over the land upon Squaw Island, the smaller branch of Niagara River, and the canal near Black Rock Harbor, are just as much parts of the whole International Bridge, and are just as necessary to that bridge as a railroad bridge, as is the main part over the main branch of the Niagara River.

No one would have built, or could now afford to maintain any one of these parts except as parts of the whole International Railroad bridge—a bridge well named “The International Bridge” of the defendant “International Bridge Company.” The various parts of this bridge, including the part in question over Black Rock Harbor, upon land deeded to the United States Government by the State of New York, and now owned absolutely by the United States Government, were all built, and this particular part has been rebuilt, as directed by the Secretary of War under the Acts of Congress. When

the construction of this bridge was commenced in 1870, general legislation by Congress upon this subject was not in its present advanced state, but when the bridge was finished, all possible questions of compliance with the Act of Congress of June 30, 1870, were ended for all time by the Act of Congress of June 23, 1874, which in express words "approved" the modifications in the plans for this bridge as suggested by the Board of Engineers of the War Department February 7, 1871. Not only did that act applying to this bridge approve of what was thus done, but it went farther and expressly declared such bridge "to be a lawful structure and an established post route for the mail of the United States." (Finding VII, fol. 214.)

This International Bridge having thus been built under the authority of and with the express approval of the Congress of the United States and the Secretary of War, as the executive officer carrying into effect the legislation of Congress in this particular, and later the particular part of the bridge in question having been rebuilt as directed by the Secretary of War, is the International Bridge Company now compelled to take orders from another master and build additions to the part thus rebuilt? Is the International Bridge Company compelled to serve two masters with reference to this bridge, one the National Government telling it how and where to build or rebuild, and the other the State of New York telling it where to build additions not required by the National Government, to escape severe fines and penalties imposed by the State? If some specu-

lator, or investor, in land upon Squaw Island, or elsewhere, can induce the Legislature of the State of New York to pass a special Act directing this particular Bridge Company to build an addition to its bridge that will be particularly and especially beneficial to his investment in land, can he force the International Bridge Company to do his will if the Legislature put sufficiently heavy fines and penalties in the Act for that purpose?

The answer to these questions is that after the International Bridge Company has repeatedly obeyed the United States Government as required, it cannot be further forced to obey the orders of the State of New York in respect to details as to which the United States Government has left the International Bridge Company entirely free from any requirements whatever. An International Bridge, constructed under national authority, cannot thus be changed into a mere local bridge to Squaw Island by orders from the State of New York.

To cite the cases from *Gibbons vs. Ogden*, 9 Wheaton, 1, to the latest cases decided by this Court, is only to call attention to the stress which they all lay upon the great controlling fact that when the National Government takes and exercises jurisdiction, however slight that exercise may be, such exercise of jurisdiction, in the language of all the cases, is "paramount" and "exclusive" of any other exercise of jurisdiction over the same subject matter. To put the matter in another way: The exercise of the national jurisdiction is "exclusive" in that it excludes any exercise of

jurisdiction by a State, and "inclusive," in that it includes all the details of the subject matter, so that a State may not exercise jurisdiction over one or more of the details just because such details have not been specifically mentioned in the exercise of jurisdiction by the National Government.

The principle to be deduced from all the decisions is that the exercise by Congress of its paramount and exclusive power over a particular subject withdraws it, with all its incidents, from the jurisdiction of the state.

The pith and substance of the matter is that the Legislature of the State of New York has undertaken to amend the special and general acts of Congress with reference to this international bridge, by making additional onerous provisions as to one end of it, wholly ignoring the unequivocal exercise of power by Congress and the Secretary of War in requiring changes in this end of the bridge and in approving tolls to be charged for the use of any highway which might be constructed upon it at the option of the Bridge Company, and in conferring special jurisdiction on the United States District Court over controversies in regard to the use of the bridge by railroads.

POINT V.

The power of Congress over this international bridge is exclusive and all State legislation concerning it is ineffective except in so far as it has been expressly adopted and validated by Congress, because the subject-

matter involves the external relations of the United States with foreign governments.

The trial court expressly found—

“That all of the commerce passing over the bridge of the defendant across the Niagara River, between the City of Buffalo, New York, and the Dominion of Canada, is either interstate commerce or foreign commerce between the United States and foreign nations, and said bridge is an instrumentality of such interstate and foreign commerce.

“That the Niagara River is a navigable water of the United States forming the international boundary between the United States and the Dominion of Canada, a dependency of the British Empire.”

(Decision, Findings XVIII and XIX, pages 63 and 64.)

The Niagara River is subject to the treaty proclaimed May 13, 1910, between the United States and Great Britain, concerning boundary waters between the United States and Canada. This treaty will be more fully considered under our next point. The point which we make now is that the bridging of the Niagara River is as proper a subject for the exercise of the treaty power between the United States and Great Britain as the free navigation of its waters, and hence, is equally outside the province of state government.

Commerce crossing boundary waters by bridge

has the same status as commerce moving along such boundary waters by vessel.

Pennsylvania v. Wheeling & Belmont Bridge Co., 18 Howard, 421.

Gilman vs. Philadelphia, 3 Wallace, 713.

United States v. Railroad Bridge Company, 6 McLean, 517.

The International bridge is a physical link between the United States and a portion of the British Empire, giving access to our territory to foreign peoples and foreign goods. Primarily, it is an instrument of foreign rather than interstate commerce. A large part of the commerce passing over it is strictly foreign, having its origin or destination in a foreign country; the remaining commerce passing over it must cross foreign territory in its passage between the states, and thus takes on the character of foreign rather than merely interstate commerce.

The Bridge Company is an international corporation, created, consolidated and regulated in part by acts of the Parliament of the Dominion of Canada.

(Decision, Finding I, pages 51 and 52.)

The bridge is an international structure, one-half of which lies in Canadian territory and is subject to the jurisdiction of the Canadian government and courts. The physical situation is such that all effective action and legislation concerning the construction, maintenance and operation of the

bridge must of necessity be international in character, and involve continuous relations and joint action and co-operation with the Canadian government. This being the case, it is inherently a subject for exclusive federal jurisdiction, and it is more than doubtful whether the State of New York ever had or could have any power to deal with it, even in the absence of action by Congress.

The theory and genius of our system of government, reserving to the states matters of domestic concern and conferring upon the United States exclusive power over all external relations, negative the power of a state to enter into a co-operative relation with a foreign government for the creation and control of a physical connection between foreign territory and the territory of the United States, to be used as an instrument of foreign commerce and intercourse, and capable of being used as a means of invasion in time of war.

The case differs from the cases previously considered, involving interstate commerce, where the several states may regulate such commerce and its instrumentalities until such time as Congress sees fit to intervene and assume control. In such cases the states have power to act until their power is superseded by the dominant power of Congress. But where external relations and foreign commerce are involved, the states are wholly without power to act, even in the absence of action on the part of Congress. The whole subject-matter is forbidden to them because it involves the relations of the United States with foreign peoples and governments, and the intermeddling

of the states in such matters, upon the ground of inaction on the part of Congress, would inevitably be fraught with danger and mischief.

It follows that all of the state legislation in regard to this bridge, from the original act of 1857 to and including the act of 1915 now before this court, insofar as such state legislation goes beyond the mere creation of a corporation to bridge the Niagara River when and as authorized by Congress and the Parliament of the Dominion of Canada, and the internal management of such corporation, and undertakes to prescribe the terms and conditions upon which the bridge may be constructed and maintained, and to regulate the tolls to be charged and uses to which the structure may be put, is nugatory, except as such state legislation has been expressly adopted by Congress and has derived vitality therefrom.

The original Act of Congress, passed in 1870, adopted and validated the prior state legislation by authorizing the construction and maintenance of the bridge, as provided by the acts of the New York Legislature then in force; but at the same time Congress modified such legislation by introducing new requirements in regard to the construction of the bridge, and by conferring special jurisdiction upon the United States District Court in relation to disputes over its use by railroads. The New York acts thus validated by Congress did not require the construction of a footway and roadway on the bridge, as we have shown under Point II of this brief, and, of course, did not require the corporation to maintain a highway

bridge between Buffalo and Squaw Island. The Act of Congress of 1870 authorized a bridge "which shall be constructed across the Niagara River from the City of Buffalo, N. Y., to Canada", and made no provision for access to Squaw Island.

The act of Congress of 1874, after the completion of the structure, specifically approved the modification of the plans consisting in the omission of the highway wings and declared the bridge *as constructed* (*i. e.*, without footway or roadway, and, of course, without access to Squaw Island), to be a lawful structure. Thereafter the Bridge Company was without authority to construct a highway wing on its bridge.

Congress may have had grave political reasons for approving the omission of the highway feature. Not only would a bridge devoted solely to railroad use be more efficient as an instrument of the vast and important foreign and interstate commerce destined to pass over it, but it is evident that a highway bridge giving easy access from Canada to a large city on the American side, would measurably increase the difficulty of enforcing the immigration laws of Congress, and might easily furnish the seed of international complications in other respects.

The New York Act of 1915, requiring the construction of a highway bridge between Buffalo and Squaw Island, never having been adopted or validated by Congress, and being inconsistent with all federal legislation and administrative action relating to the International bridge, is a mere nullity, a mere unauthorized meddling by the

State of New York with a physical connection between the United States and foreign territory and instrument of foreign commerce, involving the external relations of the United States with the British Empire.

The decisions of this court amply sustain our contention that the United States, like every other sovereign nation, has inherent and exclusive control over its boundaries for the purpose of protecting its territory against invasion, of excluding or regulating the admission of aliens and foreign goods, and of regulating, in all respects, its external relations with foreign nations. Such power "is inherent in sovereignty and essential to self preservation".

Turner v. Williams, 194 U. S. 279, 290.

"In the United States this power is vested in the National Government to which the Constitution has committed the entire control of international relations in peace as well as in war. It belongs to the political department of the government and may be exercised either through treaties made by the President and Senate or through statutes enacted by Congress."

Nishimura Ekin v. United States, 142 U. S. 651, 659.

"The authority of Congress over the right to bring aliens into the United States embraces every conceivable aspect of that subject."

Oceanic Navigation Company v. Stranahan, 214 U. S. 320, 340.

Is not the creation and regulation of a bridge between Canada and the United States an obvious aspect of that subject?

The power of Congress over foreign commerce has been described by this court as "plenary", "exclusive and absolute" and "complete and absolute".

Buttfield v. Stranahan, 192 U. S. 470, 493, 494.

U. S. v. 43 Gallons of Whiskey, 93 U. S. 188, 194.

Head Money Cases, 112 U. S. 580, 591.

Oceanic Navigation Co. v. Stranahan, 214 U. S. 320, 343.

In upholding the act of Congress excluding Chinese laborers from the United States, this court said:

"While under our Constitution and form of government the great mass of local matters is controlled by local authorities, the United States, in their relation to foreign countries and their subjects or citizens are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory. The powers to declare war, make treaties, suppress insurrection, repel

invasion, regulate foreign commerce, secure republican governments to the States, and admit subjects of other nations to citizenship, are all sovereign powers, restricted in their exercise only by the Constitution itself and considerations of public policy and justice which control, more or less, the conduct of all civilized nations. As said by this court in the case of *Cohens v. Virginia*, 6 Wheat. 264, 413, speaking by the same great Chief Justice: 'That the United States form, for many, and for most important purposes, a single nation, has not yet been denied. In making peace we are one people. In all commercial regulations, we are one and the same people. In many other respects, the American people are one; and the government which is alone capable of controlling and managing their interests in all these respects, is the government of the Union. It is their government, and in that character they have no other. America has chosen to be in many respects, and to many purposes, a nation; and for all these purposes her government is complete; to all these objects, it is competent. The people have declared, that in the exercise of all powers given for these objects, it is supreme. It can then in effecting these objects legitimately control all individuals or governments within the American territory. The constitution and laws of a State, so far as they are repugnant to the Constitution and laws of the United States, are absolutely void. These States are

constituent parts of the United States. They are members of one great empire—for some purposes sovereign, for some purposes subordinate.’ The same view is expressed in a different form by Mr. Justice Bradley, in *Knox v. Lee*, 12 Wall. 457, 555, where he observes that ‘the United States is not only a government, but it is a national government, and the only government in this country that has the character of nationality. It is invested with power over all the foreign relations of the country, war, peace and negotiations and intercourse with other nations; all which are forbidden to the state governments.’

* * * * *

“For local interests the several States of the United States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.”

The Chinese Exclusion Case, 130 U. S. 581, 604, 605, 606.

In a later case this court said:

“The United States are a sovereign and independent nation, and are vested by the Constitution with the entire control of international relations, and with all the powers of government necessary to maintain that control and to make it effective. The only government of this country, which other nations recognize or treat with, is the govern-

ment of the Union; and the only American flag known throughout the world is the flag of the United States.

The Constitution of the United States speaks with no uncertain sound upon this subject. That instrument, established by the people of the United States as the fundamental law of the land, has conferred upon the President the executive power; has made him the commander-in-chief of the army and navy; has authorized him, by and with the consent of the Senate, to make treaties, and to appoint ambassadors, public ministers and consuls; and has made it his duty to take care that the laws be faithfully executed. The Constitution has granted to Congress the power to regulate commerce with foreign nations, including the entrance of ships, the importation of goods and the bringing of persons into the ports of the United States; to establish a uniform rule of naturalization; to define and punish piracies and felonies committed on the high seas, and offences against the law of nations; to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water; to raise and support armies, to provide and maintain a navy, and to make rules for the government and regulation of the land and naval forces; and to make all laws necessary and proper for carrying into execution these powers, and all other powers vested by the Constitution in the government of the United

States, or in any department or officer thereof. And the several States are expressly forbidden to enter into any treaty, alliance or confederation; to grant letters of marque and reprisal; to enter into any agreement or compact with another State, or with a foreign power; or to engage in war, unless actually invaded, or in such imminent danger as will not admit of delay."

Fong Yue Ting v. United States, 149
U. S. 698, 711, 712.

The power of the federal government to deal with international questions involving foreign intercourse is exclusive, and even in the absence of treaties or acts of Congress on the subject, such matters cannot become the subject of negotiation or joint action between a state of the Union and a foreign government.

United States v. Rauscher, 119 U. S. 407,
414.

In denying the right of the State of Vermont to extradite to Canada a fugitive from justice, Chief Justice Taney said, in an early case:

"All the powers which relate to our foreign intercourse are confided to the general government. Congress have the power to regulate commerce; to define and punish piracies and felonies committed on the high seas, and offences against the laws of nations; to declare war; to grant letters of marque and

reprisal; to raise and support armies; to provide and maintain a navy. And the President is not only authorized, by and with the advice and consent of the Senate, to make treaties; but he also nominates, and by and with the advice and consent of the Senate appoints ambassadors and other public ministers, through whose agency negotiations are to be made, and treaties concluded. He also receives the ambassadors sent from foreign countries; and every thing that concerns our foreign relations, that may be used to preserve peace or to wage war, has been committed to the hands of the federal government."

* * * * *

"The states are forbidden to enter into any 'agreement' or 'compact' with a foreign nation; and as these words could not have been idly or superfluously used by the framers of the Constitution, they cannot be construed to mean the same thing with the word treaty. They evidently mean something more, and were designed to make the prohibition more comprehensive."

* * * * *

"The word 'agreement', does not necessarily import any direct and express stipulation; nor is it necessary that it should be in writing. If there is a verbal understanding to which both parties have assented, and upon which both are acting, it is an 'agreement'. And the use of all of these terms, 'treaty', 'agree-

ment', 'compact' show that it was the intention of the framers of the Constitution to use the broadest and most comprehensive terms; and that they anxiously desired to cut off all connection or communication between a state and a foreign power; and we shall fail to execute that evident intention, unless we give to the word 'agreement' its most extended signification; and so apply it as to prohibit every agreement, written or verbal, formal or informal, positive or implied, by the mutual understanding of the parties."

* * * * *

"Can it be supposed that the constitutionality of the act depends on the mere form of the agreement? We think not. The Constitution looked to the essence and substance of things, and not to mere form. It would be but an evasion of the Constitution to place the question upon the formality with which the agreement is made. The framers of the Constitution manifestly believed that any intercourse between a state and a foreign nation was dangerous to the Union; that it would open a door of which foreign powers would avail themselves to obtain influence in separate states. Provisions were therefore introduced to cut off all negotiations and intercourse between the state authorities and foreign nations. If they could make no agreement, either in writing or by parol, formal or informal, there would be no occasion for negotiation or intercourse between the state

authorities and a foreign government. Hence prohibitions were introduced, which were supposed to be sufficient to cut off all communication between them.

But if there was no prohibition to the states, yet the exercise of such a power on their part is inconsistent with the power upon the same subject conferred on the United States."

Holmes v. Jennison, 14 Peters, 540, 570, 571, 573, 574.

The prohibition of the constitution against a state entering into any agreement or compact with a foreign power without the consent of Congress, applies to such agreements or compacts as are in their nature political.

Virginia v. Tennessee, 148 U. S. 503, 519.

The establishment of a physical connection between the territory of this country and a foreign nation must always raise a political question as to the safety and expediency of such a connection. In this respect it differs vitally from the establishment of such a physical connection between states of the Union. The agreement being political in nature, it matters not how informally it may be made, it falls within the prohibition of the constitution.

Holmes v. Jennison, 14 Peters 540.

Exclusive of any legislation on the subject, no one, alien or native, has any right to establish a

physical connection between the shores of this country and any foreign country, without the consent of the United States. Whether such consent shall be granted or refused is a political question which, in the absence of legislation, would seem to rest with the executive.

U. S. vs. La Compagnie Francaise Des Cables Telegraphiques, 77 Fed. Rep. 495.

The New York Court of Appeals, in holding unconstitutional an act of the New York Legislature providing for the surrender of fugitives from justice from foreign countries, at a time when Congress had not acted upon the subject, said:

"The general government might adopt a policy of refusing to make an extradition treaty with all nations, or it might refuse as to Belgium or any other particular country. It cannot be said from the absence of a treaty with any country or all countries, that the power is dormant. It may be as much exercised by refusing as by making a treaty.

* * * The nature of the power is such that it cannot be dormant. It is necessarily in active exercise by the government when acting or omitting to act. The dormant powers are such as the States may exercise over their internal affairs without colliding with the action or non-action of the general government. * * * But the dormant powers, as they are called, are those which may be

exercised for the protection of the States within their territories, and relate to their internal affairs. As to foreign intercourse and all questions relating thereto, the government alone can speak and act, and the power is therefore necessarily exclusive."

People v. Curtis, 50 N. Y. 321, 328.

And for like reasons the inference to be drawn from the silence and inaction of Congress in relation to foreign commerce as excluding state action is far stronger than in relation to interstate commerce.

"* * * the inference to be drawn from the absence of legislation by Congress on the subject excludes state legislation affecting commerce with foreign nations more strongly than affecting commerce among the states. Laws which concern the exterior relations of the United States with other nations and governments are general in their nature, and should proceed exclusively from the legislative authority of the nation. The organization of our state and Federal system of government is such that the people of the several States can have no relations with foreign powers in respect to commerce or any other subject, except through the government of the United States and its laws and treaties. *Henderson v. Mayor of New York* (92 U. S. 259, 273).

The same necessity perhaps does not exist equally in reference to commerce among the States."

Bowman v. Chicago, etc. Ry. Co., 125 U. S. 465, 482.

Crutcher v. Kentucky, 141 U. S. 47, 57.

Buttfield v. Stranahan, 192 U. S. 470, 492, 493.

Passenger Cases, 7 Howard, 283.

The application of these principles to the construction, maintenance and operation of an International bridge, connecting the territory of the United States with the territory of a foreign nation is clear.

Our relations with the Dominion of Canada have been so long unclouded that danger along this frontier appears remote. Yet little more than one hundred years ago the Canadian frontier was the scene of active warfare. The Village of Buffalo was burned by British troops, and important battles took place within a few miles of the Canadian terminus of this bridge. At the close of the Civil War, in 1866, and but four years before this bridge was authorized by Congress, the friendly relations between Great Britain and the United States were again threatened by a Fenian raid into Canada, which was organized and started from the City of Buffalo. Two battles were fought within 10 miles of the Canadian end of the bridge, one at Fort Erie and the other at Ridgeway, before the invaders were repulsed. During the early years of the World War just ended,

while our nation was still neutral, unceasing vigilance on the part of the federal authorities was required to prevent our territory, and in particular the City of Buffalo, from becoming a starting point of intrigues and attacks against the Dominion of Canada.

It must also be remembered that any rule adopted here will apply equally to our southern border, where conditions are by no means reassuring. The disturbances along the Mexican Border for several years past illustrate our contention. On that frontier there have been frequent raids into United States territory, accompanied by outrages against peaceful inhabitants, who have lived under a continuous threat of war. A considerable force of United States troops was stationed along the border during the year 1916-1917. After we became involved in the World War, it is alleged by competent authority that Mexican territory proved a haven for alien enemies plotting against the United States.

Assuming that Congress had not spoken on the subject, could the Legislature of Texas, for example, for the purpose of increasing local trade, enter into negotiations with Mexico, or provide by concurrent legislation for a bridge across the Rio Grande, at some strategic point, which might offer to the enemies of the United States easy access to its territory? Is not this precisely one of the perils which the Constitution aimed to prevent? Is not the subject so involved, not only with the regulation of foreign commerce, but also with the protection of the United States against invasion, the security of its territory, the exclusion of un-

desirable aliens, the escape of fugitives from justice and of political offenders across the border, and other matters involving the external relations of the United States with foreign governments, that in its very nature it must rest under the exclusive power of the general government? Is not every act of a state government, assuming to authorize such an international bridge, or to regulate its operation and use after it is constructed, a usurpation of power by the state and a mere nullity, unless validated by subsequent adoption by Congress? We believe that the decisions of this court to which we have referred give an affirmative answer to this question.

This court will not be misled by the circumstance that the highway bridge which the state now requires the Bridge Company to attach to its structure would lie wholly within the territory of the United States, and the State of New York. If the state has power to compel the construction on this international bridge of a highway bridge to Squaw Island, it has equal power to compel the construction of a highway wing on the bridge as far as the international boundary, and if Canada should then choose to compel the construction of such a wing on the portion of the bridge within her territory, the result would be that the construction of a highway bridge across the international boundary might be compelled by the New York and Canadian governments acting concurrently, without any action or consent of Congress.

POINT VI.

The Court of Appeals erred in holding that the New York Act of 1915 did not contravene the treaty entered into by and between the United States and Great Britain, proclaimed May 13, 1910, concerning boundary waters between the United States and Canada.

The right and immunity of the plaintiff in error under the treaty with Great Britain, proclaimed in 1910, was expressly raised in the Court of Appeals, though entirely ignored in the opinion of that learned court.

The relevant portions of this treaty are as follows:

“PRELIMINARY ARTICLE”:

“For the purposes of this treaty boundary waters are defined as the waters from main shore to main shore of the lakes and rivers and connecting waterways, or the portions thereof, along which the international boundary between the United States and the Dominion of Canada passes, including all bays, arms, and inlets thereof, but not including tributary waters which in their natural channels would flow into such lakes, rivers, and waterways, or waters flowing from such lakes, rivers, and waterways, or the waters of rivers flowing across the boundary.

“ARTICLE I”:

“The High Contracting Parties agree that the navigation of all navigable boundary waters shall forever continue free and open for the purposes of commerce to the inhabitants and to the ships, vessels, and boats of both countries equally, subject, however, to any laws and regulations of either country within its own territory, not inconsistent with such privilege of free navigation and applying equally and without discrimination to the inhabitants, ships, vessels, and boats of both countries.”

Article V regulates the diversion of water from the Niagara River.

The federal government has thus recognized that the commerce across the Niagara River is not merely national but international. This court in discussing a burdensome regulation imposed by the State of New York on ship masters as a condition of landing passengers, said:

“A regulation which imposes onerous, perhaps impossible, conditions on those engaged in active commerce with foreign nations, must of necessity be national in its character. It is more than this; for it may properly be called *international*. It belongs to that class of laws which concern the exterior relation of this whole nation with other nations and governments. If our government should make the restrictions of these burdens on commerce

the subject of a treaty, there could be no doubt that such a treaty would fall within the power conferred on the President and the Senate by the Constitution. It is in fact, in an eminent degree, a subject which concerns our international relations, in regard to which foreign nations ought to be considered and their rights respected, whether the rule be established by treaty or by legislation."

* * * * *

"It is apparent, therefore, that, if there be a class of laws which may be valid when passed by the States until the same ground is occupied by a treaty or an act of Congress, this statute is not of that class."

Henderson v. New York, 92 U. S. 259,
273.

Not only is the commerce upon and across the Niagara River, including Black Rock Harbor as an "arm" thereof, clearly a proper subject for the exercise of the treaty-making power of the general government and hence forbidden to the state, but it appears that that power has been exercised by the general government, and that a treaty between the United States and Great Britain, regulating such commerce and protecting the freedom of navigation upon the river for the benefit of the inhabitants of both nations, is now in force. That the construction of a highway wing on the Black Rock Harbor draw of the International Bridge, by widening the structure, might increase the obstruction to the free navigation of

this arm of the Niagara, is clear. The United States and Great Britain having by treaty taken under their protection the commerce on the Niagara, the State of New York is wholly disabled from interfering therewith in the slightest degree. This applies equally to commerce across the river by bridge, as to commerce along the river by vessel. There is no legal distinction between these two forms of commerce, or the power of the general government in relation thereto.

Pennsylvania v. Wheeling & Belmont Bridge Co., 18 How. 421.

Gilman v. Philadelphia, 3 Wallace, 713.

Latinette v. St. Louis, 201 Fed. Rep. 676.

The treaty-making power having acted on the general subject of commerce upon the Niagara, its silence in regard to commerce crossing the Niagara River by bridge did not leave that subject to the control of the State of New York, but amounted to a declaration that such commerce should be free from state interference.

United States v. Rauscher, 119 U. S. 407, 414.

Bowman v. Chicago Ry. Co., 125 U. S. 465, 482.

People v. Curtis, 50 N. Y. 321, 328.

The question whether federal jurisdiction over the Niagara River is exclusive, or subject to State interference, is a public question of gravest moment. Congress assumed jurisdiction over this

river in connection with the diversion of water at Niagara Falls by the so-called Burton Act of January 29, 1906, and in 1910 the above treaty was entered into by the United States and Great Britain providing for the freedom of navigation of all boundary waters between the United States and Canada, including the Niagara River, and also for the diversion of water from this river above the Falls. At every session of Congress since 1910 bills have been introduced to regulate the diversion of water pursuant to the treaty. Officials of the State of New York, including ex-Governor Glynn, ex-Attorney General Carmody, the Chairman of the Conservation Commission and members of the Joint Committee appointed by the Legislature in relation to the development of Niagara Falls power, appeared at Congressional hearings and asserted what they deemed to be the rights of the State of New York in relation to the Niagara River. After hearing these officials the Committee on Foreign Affairs made a report to Congress July 20, 1914, recommending the passage of the bill then before Congress, from which we quote the following:

“The committee believes that the jurisdiction of the Federal Government over the Niagara River, once asserted in conjunction with the Dominion of Canada under treaty relations, is unquestionable and paramount; that it is the duty of the Federal Government to assume complete and permanent jurisdiction of the boundary waters between the two countries, subject only to the incidental rights

of the riparian owner when these rights do not conflict with such Federal authority. Under the constitutional power to take jurisdiction for navigation and commercial purposes, it may well be assumed that such authority is inclusive of the further jurisdictional rights, because the Niagara River is a boundary stream and navigable and a means of national defense. Involved as Niagara River is with the Great Lakes and other boundary streams which, together, constitute more than 1,000 miles of these boundary waters, it is difficult to discern why exclusive control of these boundary waters ought not to exist in the Federal Government. Intimately connected as they are with such important interests, of great moment to the United States and the Dominion of Canada, it is not conceivable how any other authority than the Federal Government could invoke jurisdiction." * * *

"It has been suggested that no permit by the General Government for diversion of water should be issued without the consent of the State in which the diversion occurs. The committee believes that there are several reasons why the Secretary of War should have charge of the diversion. First, it is not the policy of the Government to share jurisdiction with a State or to confer concurrent jurisdiction upon a State over a subject matter where the Federal authority assumes to exert complete control."

POINT VII.

The Court of Appeals erred in applying to this case the rule applicable to navigable rivers wholly within a single state.

Upon this subject the court said:

“After the consolidation took place the defendant had the right to build the bridge. The state of New York, however, had the title to, and governmental control of, the land under the waters of the river. This control, nevertheless, was subject to the supervision of the United States in so far as commerce was concerned, but this supervision did not give to the United States government, as against the state of New York, the authority to construct a bridge, nor could it take the state’s property in the bed of the river for that purpose any more than it could take property elsewhere without condemnation and payment. It could give its consent to the construction of a bridge upon such terms as it saw fit and even after the bridge was built, if it interfered with commerce, could withdraw its consent and compel its removal. It did consent that defendant construct piers for the bridge on property of the state and the bridge, with the consent of the state, was built on such property. No way was provided for pedestrians or vehicles. It was built primarily for interstate and foreign commerce, but this did not give the United States any

other or greater supervision over it than it otherwise had. It could simply regulate its use for interstate and foreign commerce. This did not subject the defendant to the control of the United States government in any other respect. It still remained a New York corporation which state had the power to regulate within its limits matters of internal police, including in that general designation 'whatever would promote the peace, comfort, convenience and prosperity of its people.' This power included among other things the construction of bridges within its territory. It is only so much of the bridge which is here being considered as lies entirely within the state of New York, and while it gave the right, in the first instance, to construct the bridge, it retained the right, in the interest of the people of the state, to supervise and direct how it should be used, subject only to the Federal government's regulations so far as such use might relate to interstate and foreign commerce. The relation thus existing between the parties was not, in my opinion, changed by the fact that the state of New York ceded to the United States the land under the waters of the Niagara river including a portion of the Erie canal adjacent to Black Rock harbor. At the time the grant was made the bridge had been built. It rested on piers in the river. The grant, of course, was subject to visible rights then existing and therefore obtained. These rights could not be

destroyed by a grant from the state to the United States. As before indicated, the United States could, before acquiring the grant, have compelled the defendant to remove the bridge. It could have done this just as well before the grant was made as it could afterwards. The power to do this existed independent of the grant and in no way depended upon it. It was one which the Federal government inherently possessed for the purpose of controlling interstate and foreign commerce. *Escanaba Co. v. Chicago*, 107 U. S. 678; *Cummings v. Chicago*, 188 U. S. 410.)”

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“The case now before us, so far as the contention is made that the Federal government has assumed exclusive control of the bridge, is governed, as it seems to me, by *Cummings v. Chicago* (*supra*) and the authorities there cited.”

People v. International Bridge Co., 223 N. Y. 137, 145, 146, 147.

The Court of Appeals plainly erred in its conception of the nature and extent of the Federal power over foreign and interstate commerce, as appears by its statement that Federal supervision over interstate and foreign commerce “did not give to the United States government as against the State of New York authority to construct a bridge, nor could it take the state’s property in the bed of the river for that purpose.”

It is well settled that Congress may confer upon a public or private corporation, organized under the laws of a state, the right to bridge an interstate or international boundary stream without the consent and even against the objection of the states affected, and may confer upon such corporation the power of eminent domain, to be exercised within the states; or, if it prefers, Congress may act directly.

Stockton v. Baltimore & N. Y. R. Co., 32
Fed. Rep. 9; Appeal dismissed 140
U. S. 699.

Decker v. Baltimore & N. Y. R. Co., 30
Fed. Rep. 723. ?

*Pennsylvania Ry. Co. v. B. & N. Y. R. R.
Co.*, 37 Fed. Rep. 129.

Bridge Co. v. U. S., 105 U. S. 470, 475.

Luxton v. North River Bridge Co., 153
U. S. 532.

The whole matter is succinctly stated by the Circuit Court of Appeals, 7th Circuit, in a recent case:

“That the construction and operation of the bridge across the Mississippi, so that the bridge should not obstruct navigation of the waterway, and that the bridge and its necessary approaches might serve as a postroad and as a landway for interstate commerce, were national matters, that the nation had the right itself to build and maintain the bridge and approaches, and, for the purpose

of acquiring land for the approaches, to exercise the power of eminent domain either directly or through a corporation created by it for that end, without the consent or over the objection of the state—are propositions too well settled to warrant elaboration or debate. *Kohl v. U. S.*, 91 U. S. 367, 23 L. Ed. 449; *California v. Pacific R. Co.*, 127 U. S. 39, 8 Sup. Ct. 1073, 32 L. Ed. 150; *Luxton v. North River Bridge Co.*, 153 U. S. 525, 14 Sup. Ct. 891, 38 L. Ed. 808; *Wilson v. Shaw*, 204 U. S. 24, 27 Sup. Ct. 233, 51 L. Ed. 351. Contention is therefore narrowed to this: That Congress could not constitutionally select appellee as the agency through which a national power should be exercised. Nothing in the Constitution forbids the selection of a state corporation as a national agent. In reason the material thing is the principal's authority, not the parentage or birthplace of the agent. And the decisions of Mr. Justice Bradley at circuit in *Stockton v. B. & N. Rld. Co.* (C. C.) 32 Fed. 9, and of the Supreme Court in *Cherokee Nation v. Kansas Ry. Co.*, 135 U. S. 641, 10 Sup. Ct. 965, 34 L. Ed. 295, explicitly cover the point."

Latinette v. City of St. Louis, 201 Fed. Rep. 676, 678, 679.

The franchise to bridge the Niagara came from Congress, which was alone competent to grant it. This is apparent from the fact settled by abundant authority that the bridge could be built on the

authority of Congress alone, even against the objection of the state, while, on the other hand, any authority received from the state was always subordinate to the paramount action of Congress and might, at any time, be revoked by it.

Monongahela Navigation Co. v. U. S., 148

U. S. 312, 342.

Union Bridge Co. v. U. S., 204 U. S. 364.

Monongahela Bridge Co. v. U. S., 216

U. S. 177.

Congress has supreme control of a navigable stream where the commerce thereon is foreign or interstate.

United States v. Rio Grande, 174 U. S. 690.

Union Bridge Co. v. U. S., 204 U. S. 364.

Philadelphia Co. v. Stimson, 223 U. S. 605.

Hagerla v. Mississippi R. P. Co., 202 Fed. Rep. 776.

Congress has always carefully distinguished the construction of bridges over navigable waters wholly within a single state and the construction of bridges over waters not wholly within a single state.

Thus, in the Act of Congress of Sept. 19, 1890, (Chap. 907) Congress prohibited the erection of bridges over navigable waters under state legislation before the approval of the plans by the Secretary of War, and added this proviso:

"PROVIDED, That this section shall not * * * be so construed as to authorize the construction of any bridge * * * or other works under an act of the Legislature of any state over or in any stream * * * or other navigable water not wholly within the limits of such state."

This act is historically important as showing the public policy of Congress in regard to navigable waters not wholly within one state.

The General Rivers and Harbors Act of 1899, now in force, also emphasizes the distinction between bridges over streams entirely within a single State and bridges across interstate or international streams:

"Construction of Bridges, etc., over Navigable waters; approval of plans.

It shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States *until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War; Provided, that such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location*

and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced * * *."

*Act of March 3, 1899, Chap. 425, Sec. 9,
U. S. Compiled Statutes, 1916, Section
9971.*

This Act permits structures to be built across waterways wholly within the limits of a single State under authority of the legislature of the State with the approval of the Secretary of War, *but requires the consent of Congress* in addition to the approval of the plans by the Secretary of War, in the case of navigable waters not wholly within the limits of a single State, thus manifesting the intent of Congress to exercise exclusive control over such structures.

In the case of waters wholly within the limits of a single state, the Secretary of War merely regulates the form of the structure as a possible obstruction to navigation; but *Congress confers the franchise* to cross an interstate or international waterway.

In a more recent Act, passed in 1906, Congress assumes an even more extensive jurisdiction of bridges thereafter constructed, requiring such bridges to grant equal privileges to all telegraph and telephone companies and in the case of railroad bridges, to all railroad companies desiring to use the same, and authorizing the Secretary of War to fix the rates for railroads and the tolls for street cars, vehicles and foot passengers, etc.

*Act of March 23, 1906, Chap. 1130, Secs.
1, 2, 3 and 4.*

The charter received from the State of New York conferred no right upon the International Bridge Company to bridge the Niagara River until authority had been secured from Congress, and the present right of the Bridge Company to maintain its structure in its existing form and location depends, not upon the charter received from the State of New York, but upon the special acts of Congress, authorizing the construction of the bridge, and declaring it to be a lawful structure when completed, and the subsequent consents procured from the Secretary of War when the bridge was reconstructed in 1899, and the Black Rock Harbor span was reconstructed between 1907 and 1910.

The Niagara River, instead of being a stream "wholly within the limits of a single State," is along its entire length an international boundary stream, over which jurisdiction is exercised by the United States and by a foreign nation. This plaintiff in error owes its existence to foreign as well as domestic legislation. Black Rock Harbor is that portion of the Niagara River which flows to the east of Squaw Island and is as much a part of the international stream as the portion to the west of Squaw Island where the international boundary line is located.

The Court of Appeals, in support of its decision, cites *Cummings vs. Chicago*, 188 U. S., 410, and like cases, asserting the concurrent jurisdiction of the National and State governments over navi-

gable waters. The *Cummings* case is deemed to be peculiarly in point, because it there appears that the Calumet River was improved by the Federal government and that the "right of way" (not, however, the fee of lands under water as in this case), was conveyed to the United States (188 U. S., p. 413), that the Secretary of War consented to the construction of a dock by plaintiff, which plaintiff thereupon undertook to build without obtaining a permit from the Department of Public Works of the City of Chicago, as required by the City Ordinance, and this Court held that this could not be done. The Court of Appeals wholly overlooked the determining factor in that case, which was that the Calumet River was situated *wholly within the limits of the State of Illinois*. Thus this Court, referring to the Rivers & Harbors Act of 1890 says:

"The construction claimed for the statute is that its purpose was to deprive the States of all power as to every stream, *even those wholly within their borders*, whilst the very words of the statute, saying that its terms should not be construed as conferring on the States power to give authority to build bridges on streams not wholly within their limits, by a negative pregnant with an affirmative, demonstrate that the object of the act was not to deprive the several States of the authority to consent to the erection of bridges over navigable waters *wholly within their territory*.

• • • • •

We do not overlook the long-settled principle that the power of Congress to regulate commerce among the States 'is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution.' *Gibbons vs. Ogden*, 9 Wheat., 1, 96; *Brown vs. Maryland*, 12 Wheat., 419, 446; *Brown vs. Huston*, 114 U. S., 630. But we will not at this time make any declaration of opinion as to the full scope of this power or as to the extent to which Congress may go in the matter of the erection, or authorizing the erection of docks and like structures in navigable waters *that are entirely within the territorial limits of the several States.*" (Italics ours.)

This feature exists in all of this line of cases and is emphasized by this Court.

Escanaba Co. vs. Chicago, 107 U. S., 678, 683.

Lake Shore & Michigan Southern Ry. vs. Ohio, 165 U. S., 365.

There is also a distinction between administrative acts of the Secretary of War and the deliberate exercise of authority by Congress by express legislation, such as we have here, which is essential to the creation of a franchise.

Hubbard vs. Fort, 188 Fed. R. 987.

Black Rock Harbor is the east branch of the Niagara River, where it is separated by Squaw Island. It existed in its natural state when

the first white man penetrated the wilderness along the Niagara Frontier.

The Bridge Company's charters from the State of New York and the Dominion of Canada, and its special franchise from Congress, and finally the decision in this case, all expressly recognize Black Rock Harbor as part and parcel of the Niagara River.

Laws of 1857, Chapter 753, created the appellant:

"for the construction, maintaining and managing a bridge *across the Niagara River* * * * said bridge to be constructed with two draws *across the Black Rock Harbor and the other across the main channel of the River.*"

The language of the Canadian charter, printed on page 6 of this brief, is almost identical. The act of Congress from which the Bridge Company's franchise is derived, goes further and omits Black Rock Harbor entirely, speaking only of a bridge across the Niagara River.

The learned Trial Court expressly found:

"That the Niagara River is a navigable water of the United States forming the international boundary between the United States and the Dominion of Canada, a dependency of the British Empire."

"That Black Rock Harbor is the name of *that part of said Niagara River* which passes between the mainland of the United States

and Squaw Island in such river.” * * *
(Decision, Findings XIX and XX, p. 64.)

Black Rock Harbor is included in the definition of boundary waters contained in the Treaty between the United States and Great Britain, concerning boundary waters between the United States and Canada, proclaimed May 13, 1910, before referred to, which defines boundary waters as “the waters from main shore to main shore of the lakes and rivers and connecting waterways, or the portion thereof along which the international boundary between the United States and the Dominion of Canada passes, including all bays, *arms* and inlets thereof.” * * *

This treaty provides for the freedom of navigation on such boundary waters, besides regulating the diversion of water. It unquestionably covers Black Rock Harbor.

At an early date Black Rock Harbor was improved to some extent by the State or local authorities. It was never a part of the Erie Canal, but the canal was constructed along the easterly shore of the harbor and was separated from it by a narrow strip of land down to the time when the harbor was improved by the United States Government, as appears by the deed, found by the court, from the State of New York to the United States, conveying “all the right, title and interest of the State of New York in and to said lands and waterways, including the portion of the Erie Canal and tow path *adjacent* to Black Rock Harbor and the lands under the water of the Black

Rock Harbor." The deed, which was not restricted to use for navigation, unquestionably conveyed the fee if the State possessed it.

The court found further that "said lands and waters have ever since been under the exclusive jurisdiction and control of the United States, which has exercised undisputed authority over them in connection with the improvement of Black Rock Harbor; * * * that said lands include the lands crossed by the Black Rock Harbor span of defendant's bridge" (Decision, Finding XII, pp. 35, 36).

These findings, as well as the maps in evidence, establish conclusively that Black Rock Harbor is the east branch of the Niagara River. Because the Erie Canal at this point was constructed directly adjacent to Black Rock Harbor on the east, being separated from it only by a narrow strip of land, and this portion of the canal was included in the improvement undertaken by the National Government, it was necessary for the Canal Board to pass a resolution abandoning this portion of the Erie Canal—not, as counsel would have it, because Black Rock Harbor was deemed a part of the Erie Canal, which it never was.

The fact that the State or local authorities many years ago, undertook to improve the easterly branch of the natural stream by deepening it and building a retaining wall for a distance, did not alter its status as part of the Niagara River, an international boundary stream. (*U. S. vs. Cress*, 243 U. S. 316, 326.) Nor is it important that this easterly branch of the river, for the little distance it threads its way around Squaw Island, is wholly

within the United States and the State of New York. It is none the less a part of the international boundary stream, and as such always subject to the paramount authority of Congress, and the treaty making power.

The purpose of counsel's desperate effort to divorce the east branch of the river from the west branch, and treat it as a separate entity, is to transform Black Rock Harbor into a waterway wholly within the State of New York, for the purpose of bringing this case within the rule of *Cummings vs. Chicago* (188 U. S., 410), and like cases, which rule has no application to an international stream like the Niagara River.

If we have erred as to the Calumet River, or the navigable portion of it being wholly within one state, this Court in the *Cummings* case also erred, for it based its decision expressly upon this ground. Whatever may be the status of the Calumet River, it cannot be doubted that the Niagara River is not a waterway "the navigable portions of which lie wholly within the limits of a single state," which is the only kind of a waterway over which a bridge may be built "under the authority of the Legislature of a state" in the express words of the Act of Congress March 3, 1899, Chap. 425, Sec. 9. Whenever a bridge is to be built over a river, the navigable portions of which do not lie wholly within the limits of a single state, the franchise must be sought from Congress under the terms of the act.

Nor will the police power of the state, invoked by the Court of Appeals, avail to save this legislation.

This Court, considering the nature and limitations of the police power, has said:

“This power must, however, be exercised in subordination to the provisions of the Federal Constitution. If, in the assumed exercise of its police power, the legislature of a State directly and plainly violates a provision of the Constitution of the United States, such legislation would be void.

Lake Shore, etc. R. R. Co. vs. Smith, 173 U. S., 684, 689.

Looney v. Crane Co., 245 U. S. 178.

POINT VIII.

The judgment of the court below should be reversed and the complaint should be dismissed.

First: Because the statute in question (Chap. 666 of the New York Laws of 1915) impairs the obligation of contracts and interferes with the vested property rights of the plaintiff in error in its special franchises, granted by the State of New York and the Dominion of Canada, and the Congress of the United States, to construct and maintain a bridge across the Niagara River from the City of Buffalo to Canada, by requiring it to construct and operate a highway bridge from Buffalo to Squaw Island and changing and reducing the tolls fixed in the acts of incorporation and approved by Congress.

Second: Because the rates fixed by this statute

change and reduce the rates adopted by Congress, and are confiscatory, and deprive the plaintiff in error of its property without due process of law, and the decision of the state courts that said rates are not confiscatory is based upon the earnings of the corporation in foreign and interstate commerce, which cannot be considered in this connection.

Third: Plaintiff in error acquired its franchise for the construction and maintenance of its bridge across an international boundary stream from Congress, and Congress has repeatedly asserted and exercised its paramount jurisdiction over this stream and over this bridge, including specifically Black Rock Harbor and the span of the bridge crossing over it. The stream is also governed by treaty between the United States and Great Britain and the whole subject-matter rests under the exclusive power of the federal government, which has constantly exercised that power under the commerce and treaty clauses of the federal constitution.

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